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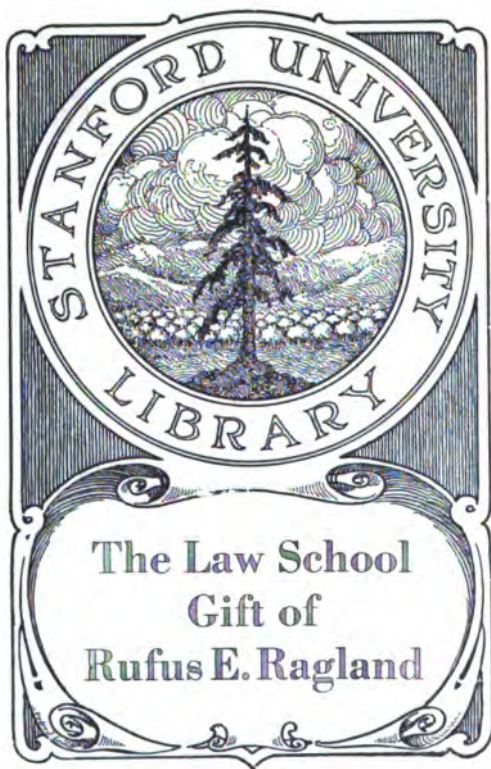
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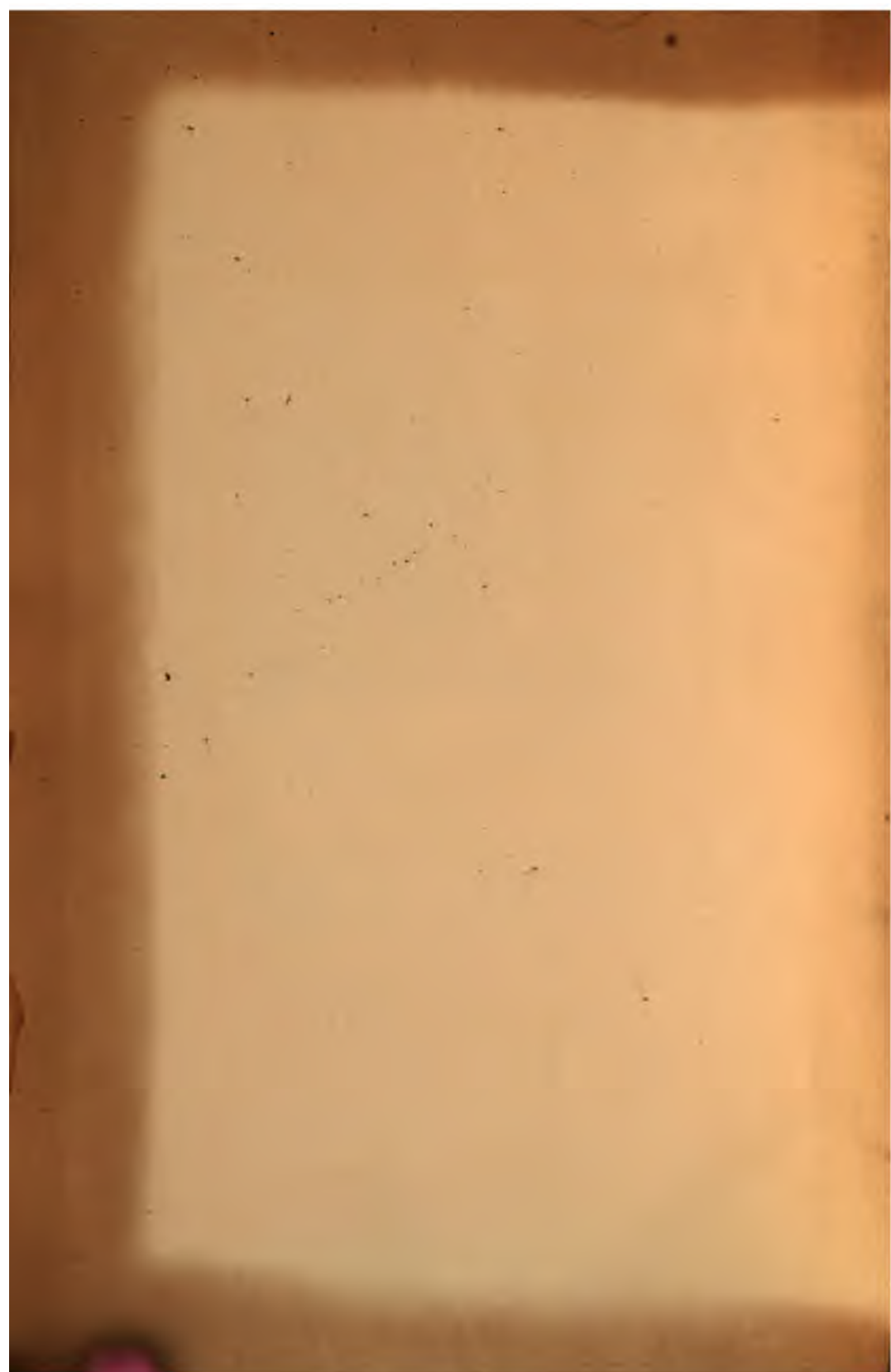
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DE
1882



ANNOTATED
Code of Criminal Procedure
AND
PENAL CODE
OF THE
STATE OF NEW YORK,
AS AMENDED IN 1882..

WITH
COPIOUS FORMS AND NOTES OF JUDICIAL DECISIONS ON
PLEADING, PRACTICE AND EVIDENCE, TOGETHER
WITH AN EXHAUSTIVE INDEX.

EDITED BY
GEORGE R. DONNAN.

ALBANY, N. Y.:
JOHN D. PARSONS, JR., LAW PUBLISHER.
1882.

Entered, according to act of Congress, in the year eighteen hundred and eighty-two,

By JOHN D. PARSONS, JR.,

In the office of the Librarian of Congress, at Washington.

ANNOTATED
CODE OF CRIMINAL PROCEDURE

OF THE

STATE OF NEW YORK,

As AMENDED IN 1882.

*With Copious Forms and Notes to Judicial Decisions
on Pleading, Practice and Evidence, together
with an Exhaustive Index.*

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CERTIFICATE
OF
THE SECRETARY OF STATE.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE,) ss.:

I, JOSEPH B. CARR, Secretary of State, do hereby certify that the following book contains a correct transcript of the Code of Criminal Procedure, passed June 1, 1881, and of the Penal Code, passed July 26, 1881, and of the amendments to both passed in 1882.

IN WITNESS WHEREOF, I have hereto set my signature, at the city of Albany, this first day of July, in the year one thousand eight hundred and eighty-two.

JOSEPH B. CARR,
Secretary of State.

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THE CODE
OF
CRIMINAL PROCEDURE
OF THE
STATE OF NEW YORK.

AN ACT
TO ESTABLISH A CODE OF CRIMINAL PROCEDURE.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

PRELIMINARY PROVISIONS.

- SECTION 1. Title of the Code.
2. Divisions of the Code.
 3. No person punishable but on legal conviction.
 4. Crimes, how prosecuted.
 5. Criminal action defined.
 6. Parties to a criminal action.
 7. The party prosecuted known as defendant.
 8. Rights of defendant in a criminal action.
 9. Second prosecution for the same crime prohibited.
 10. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

SECTION 1. **Title of the Code.** — This act shall be known as the Code of Criminal Procedure of the State of New York.

New.

§ 2. **Divisions of the Code.** — This Code is divided into six parts. The first relates to the courts having original jurisdiction in criminal actions ;

The second relates to the prevention of crime ;

The third relates to the judicial proceedings for the removal of public officers by impeachment or otherwise ;

The fourth relates to the proceedings in criminal actions prosecuted by indictment;

The fifth relates to proceedings in special sessions and police courts;

The sixth relates to special proceedings of a criminal nature.

New.

§ 3. No person punishable but on legal conviction. —

No person can be punished for a crime except upon legal conviction in a court having jurisdiction thereof.

New York State Const., art. I, § 1; U. S. Const., fifth amendment.

(a) **Ex parte affidavits insufficient.** — No person can be committed to an inebriate asylum on *ex parte* affidavits; he must be allowed to be heard in his own behalf. (*Matter of Jones*, 30 How., 446.)

(b) **Must have common-law trial.** — No inhabitant of the State of New York shall be disfranchised, or be deprived of any right or privilege, unless the matter shall be adjudged against him upon the trial had according to the course of the common law. (*Taylor v. Porter*, 4 Hill, 140; *White v. White*, 5 Barb., 474.)

(c) **Court of Special Sessions in certain cases.** — The Legislature may constitute a court of special sessions, with jurisdiction to hear and determine certain *quasi* criminal cases and punish the same without a jury trial. (*Plate v. People*, 3 Park. Cr., 586.)

(d) **Keeper of bawdy house.** — A keeper of a bawdy house may be punished summarily without trial by jury. (*Warren v. People*, 3 Park., 544.)

(e) **Forcible examination of female prohibited.** — The forcible examination, under the order of a coroner, of a female prisoner by physicians for the purpose of obtaining evidence of her recent pregnancy, is a violation of the Constitution. (*People v. McCoy*, 45 How., 215.)

(f) **Due process defined.** — "Due process" does not require a proceeding according to common law. (*Happy v. Mosher*, 48 N. Y., 818.)

"Due process" of law simply requires that the party shall have his day in court. (*People ex rel. v. Supervisors*, 70 N. Y., 228.)

§ 4. Crimes, how prosecuted. — A crime must be prosecuted by indictment, except:

1. Where proceedings are had for the removal of a civil officer of the state on impeachment by the assembly for willful or corrupt misconduct in office;

2. Where proceedings are had for the removal of justices of the peace, police justices and justices of justices' courts and their clerks;

3. A crime arising in the militia when in actual service, and

in the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace ;

4. Such crimes as are hereinafter or in special statutes specified as cognizable by courts of special sessions and police courts.

New York Const., art. I, § 6 ; U. S. Const., fifth amendment.

§ 5. **Criminal action defined.** — The proceeding, by which a party charged with a crime is accused and brought to trial and punishment, is known as a criminal action.

New.

§ 6. **Parties to a criminal action.** — A criminal action is prosecuted in the name of the people of the State of New York, as plaintiffs, against the party charged with crime.

New.

§ 7. **The party prosecuted known as defendant.** — The party prosecuted in a criminal action is designated in this Code as the defendant.

New.

§ 8. **Rights of defendant in a criminal action.** — In a criminal action the defendant is entitled :

1. To a speedy and public trial ;
2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel ; and,
3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, or, where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally according to sections two hundred and nineteen and two hundred and twenty, the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the state.

U. S. Const., art. VI ; New York Const., art. I, § 6 ; 1 R. S., 376, § 14.

(a) **Trial by court martial.** — This provision of the Constitution entitles the accused to counsel on trials by court martial. (*People ex rel. Garling v. Van Allen*, 55 N. Y., 31.)

§ 9. **Second prosecution for the same crime prohibited.**— No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted.

New York Const., art. I, § 6; 1 R. S., 376, § 13; U. S. Const., fifth amendment.

(a) **Former trial—effect of.**— A former trial and conviction cannot be given in evidence under plea of not guilty. (*People v. Benjamin*, 2 Park., 201.)

(b) **Effect of pendency of former trial.**— The pendency of a prior indictment to which he has pleaded, cannot be pleaded in abatement. (*People v. Fisher*, 14 Wend., 9.)

(c) **Plea of autrefois convict.**— The plea of autrefois convict is supported by proof of a lawful trial and verdict, though no judgment be given upon it. (*Shepherd v. People*, 25 N. Y., 406, reversing 23 How., 337; *People v. Cramer*, 5 Park., 171; see, also, *People v. Barrett*, 1 Johns., 66.)

(d) **Illegal verdict.**— A verdict upon which no judgment could have been given, cannot be pleaded as a former acquittal. (*People v. Olcott*, 2 Johns. Cas., 301.)

(e) **Must have been put in jeopardy.**— To sustain a plea of "autrefois acquit," it must appear that the prisoner was put in jeopardy on a former trial. (*Canter v. People*, 1 Abb. Dec., 305; *People v. Warren*, 1 Park., 338.)

(f) **Stealing same goods.**— A verdict of acquittal for stealing the same goods, which were charged in the former indictment as the property of another owner, cannot be pleaded in bar. (*Hughes' case*, 4 C. H. Rec., 132.)

(g) **Conviction by special sessions.**— A conviction for petit larceny before a court of special sessions, cannot be pleaded in bar of a subsequent indictment for a burglary arising out of the same act. (*People v. McCloskey*, 5 Park., 57.)

(h) **When acquittal of one offense not a bar.**— When one offense is committed the more effectually to carry into effect another, an acquittal of the latter is no bar to an indictment for the former. (*People v. Ward*, 15 Wend., 231.)

(i) **Intent.**— Former acquittal not a bar, the act being the same where the intent was different. (*People v. Warren*, 1 Park., 338.)

(j) **Effect of acquittal on charge of robbery.**— A trial and acquittal of robbery may be pleaded in bar to an indictment for larceny of the same property. (*People v. McGowan*, 17 Wend., 386.)

(k) **Former acquittal on an indictment charging an indorsement,** may be pleaded in bar to another charging forgery of the same note and indorsement. (*People v. Allen*, 1 Park., 445.)

(l) **When a bar.**— So, also, an acquittal on an indictment charging the prisoner with having in his possession a certain counterfeit note with intent to utter it, may be pleaded in bar to a subsequent indictment for having such other notes in his possession for a like intent, where all were in possession at the same time. (*People v. Van Keuren*, 5 Park., 66.)

An acquittal on the merits of the offense of forging an order in writing is pleadable in bar to a subsequent prosecution for obtaining money on the false

pretense that the instrument was true. (*People v. Krummer*, 4 Park., 217; 1 Seld., 549.)

(m) **Assault and battery not a bar to charge of rape.**—To an indictment for rape the defendant cannot plead in bar a former conviction for assault and battery arising out of the same transaction. (*People v. Saunders*, 4 Park., 196.)

An acquittal on a former indictment for nuisance is not a bar to a second prosecution, where the erection is not a nuisance *per se*. (*People v. Townsend*, 8 Hill, 479.)

(n) **Effect of nolle pros.**—A person may be tried on a second indictment after a *nolle pros.* or *supersedeas* of the first, to which the plea of jurisdiction only had been overruled. (*Gardiner v. People*, 6 Park., 155, 190.)

(o) **Where acquittal is had, no new trial.**—A new trial cannot be granted where the prisoner has been acquitted of a felony. (*People v. Comstock*, 8 Wend., 549.)

(p) **Nor writ of error.**—A writ of error in a criminal case will not lie at the suit of the people after a judgment for the defendant in a criminal case. (*People v. Cowing*, 2 N. Y., 9.)

(q) **Cannot be retried after sentence.**—A prisoner sentenced upon a regular trial and conviction cannot be retried (*Shepherd v. People*, 25 N. Y., 406), but the judgment may be corrected under the act of 1863. (*Hussy v. People*, 47 Barb., 503.)

(r) **When conviction is reversed new trial may be had.**—Where a conviction is reversed at the suit of the prisoner, a new trial may be ordered. (*People v. Ruloff*, 5 Park., 77.)

(s) **Juror cannot be withdrawn.**—Where a prisoner has been put on trial, a juror cannot be withdrawn without his consent. (*People v. Barrett*, 2 Cal., 304; *Grant v. People*, 4 Park., 537; *Klock v. People*, 2 id., 676.)

(t) **May be retried where jury disagrees.**—In case of disagreement the jury may be discharged and the person retried. (*People v. Goodwin*, 18 Johns., 187.)

So where they separate without authority and are afterwards discharged. (*People v. Reagle*, 60 Barb., 527.)

(u) **Jury discharged, when.**—In cases of misdemeanor the court of sessions may discharge the jury without consent of the prisoner, and he may be tried again. (2 Johns. Cas., 275.)

(v) **Arrest of judgment not a bar to second indictment.**—An arrest of judgment after conviction for felony is not a bar to a second indictment. (*People v. Casborus*, 18 Johns., 351.)

A prisoner is not put in jeopardy where the evidence fails to establish the offense charged. (*Canter v. People*, 1 Abb. Dec., 305.)

(w) **Assault and battery does not bar trial for murder.**—Conviction for assault and battery no bar to indictment for murder, where the person assaulted subsequently dies of the blows. (*Burns v. People*, 1 Park., 182.)

(z) **Effect of repealed law on conviction.**—Where one is convicted of murder and the law is subsequently repealed without reservation and a new law enacted, he cannot be tried again, nor can he be executed under a re-enactment of the old law. (*Hartung v. People*, 26 N. Y., 167.)

(y) **Conviction on one count acquits on others.**—A verdict of conviction on one count acquits on all others. (*Guenther v. People*, 34 N. Y., 100, *People v. Downing*, 23 Alb. L. J., 353.)

(z) **A former acquittal through a defective indictment may be pleaded in bar;** and in the absence of proof to the contrary it will be presumed to have been on the merits. (*Croft v. People*, 15 Hun, 464.)

§ 10. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.—No person can be compelled in a criminal action to be a witness against himself, nor can a person charged with crime be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

New York Const., art. I, § 6; U. S. Const., fifth amendment.

(a) **Party may be compelled to answer in certain cases.**—An act requiring parties to make discovery on oath concerning an indictable offense, but forbidding the answers from being used in evidence against him is constitutional. (*Perrine v. Striker*, 7 Paige, 598.)

Nor is a person protected from testifying in a criminal case against another on the ground that his testimony may tend to implicate him in a crime, provided he is protected by statute against the use of such testimony on his own trial. (*Harkley v. Kelly*, 24 N. Y., 74.)

(b) **Ordinary rules of evidence apply to prisoner.**—Where a prisoner testifies in his own behalf, he is subject to the same rules and tests as other witnesses. (*People v. Brandon*, 42 N. Y., 265.) By offering himself he waives the constitutional privilege. (*People v. Connors*, 50 N. Y., 240.)

(c) **Defendant may decline to answer.**—A defendant, in his answer, may object to the discovery of any matters charged in the bill which will subject him to a criminal prosecution. (*Livingston v. Harris*, 3 Paige, 528; *Leggett v. Postley*, 2 id., 599; *Taylor v. Bruen*, 2 Barb. Ch., 301.)

Or which would subject him to an indictment and punishment for a criminal offense. (*Marsh v. Davison*, 9 Paige, 580.)

Although it be provided by statute that the answer of the defendant in certain cases cannot be used in evidence against him, yet the defendant cannot be compelled to make discovery as to any charge which is indictable at common law and involves moral turpitude. (*Union Bank v. Barker*, 3 Barb. Ch., 358.)

PART I.

OF THE COURTS HAVING ORIGINAL JURISDICTION IN
CRIMINAL ACTIONS.TITLE I. OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN
GENERAL.

- II. OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.
- III. OF THE COURTS OF OYER AND TERMINER.
- IV. OF THE CITY COURTS.
- V. OF THE COURTS OF SESSIONS.
- VI. OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.

TITLE I.

OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN
GENERAL.

SECTION 11. Of the courts of original criminal jurisdiction.

§ 11. Of the courts of original criminal jurisdiction. —

The following are the courts of justice in this state having original jurisdiction of criminal actions :

1. The court for the trial of impeachments ;
2. The courts of oyer and terminer ;
3. The city courts of Brooklyn, Buffalo, Utica, Oswego and Hudson ;
4. The courts of sessions, in counties other than New York ;
5. The court of general sessions in the city and county of New York ;
6. The courts of special sessions ;
7. The police courts.

The courts of special sessions and police courts are deemed inferior courts not of record, within the section of the Constitution which provides for the removal of justices of the peace and judges, or justices of inferior courts not of record, and their clerks, by such county, city or state courts as are designated by law ; but for no other purpose.

New York Const., art. VI., §§ 18, 19.

(a) *Police justices under legislative control.* — The legislature may abolish or abridge the tenure of office of a police justice. (*Coulter v. Murray*, 15 Abb. [N. S.], 129; *Wenster v. People*, 58 N. Y., 516.)

TITLE II.

OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.

SECTION 12. Its jurisdiction.

13. Members of the court.
14. Presiding judge.
15. Clerks and officers.
16. Seal of the court.
17. Time of holding the court.
18. Oath to members of the court.
19. Adjournments, etc.
20. Compensation of members and officers of the court.

§ 12. **Its jurisdiction.** — The court for the trial of impeachments has power to try impeachments, when presented by the assembly, of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks, for willful and corrupt misconduct in office.

New York Const., art. VI, §§ 1, 18.

§ 13. **Members of the court.** — The court is composed of the president of the senate, the senators, or a majority of them, and the judges of the court of appeals, or a majority of them, but on the trial of an impeachment against the governor, the lieutenant-governor cannot act as a member of the court.

New York Const., art. VI, § 1; 3 R. S., 182, § 1.

§ 14. **Presiding judge.** — The president of the senate, or in case of his impeachment, death or absence, the chief judge of the court of appeals, or in the absence of both, such other member as the court may elect, is the presiding judge of the court.

3 R. S., 182, § 3.

§ 15. **Clerks and officers.** — The clerk and officers of the senate are the clerk and officers of the court for the trial of impeachments.

3 R. S., 182, § 3.

§ 16. **Seal of the court.** — The seal of the court for the trial of impeachments now deposited and recorded in the office of the secretary of state shall continue to be the seal of this court and must be kept in the custody of the clerk of the senate.

Id., § 4.

§ 17. **Time of holding the court.**— Upon the delivery of an impeachment from the assembly to the senate the president of the senate must cause the court to be summoned to meet at the capitol in the city of Albany, on a day not less than thirty nor more than sixty days from the day of the delivery of the articles of impeachment.

3 R. S., 183, § 10.

§ 18. **Oath to members of the court.**— At the time and place appointed, and before the court proceeds to act upon the impeachment, the clerk must administer to the presiding judge, and the presiding judge to each of the members of the court then present, an oath or affirmation truly and impartially to try and determine the impeachment; and no member of the court can act or vote upon the impeachment, or any question arising thereon, without having taken this oath or affirmation.

3 R. S., 183, § 14.

§ 19. **Adjournments, etc.**— The court may adjourn from time to time and hold its sessions at such places as it may determine, but no more than two sessions of the court can be held during the recess of the legislature in any one year.

Id., § 15.

§ 20. **Compensation of members and officers of the court.** The writ and process of the court must be signed by the clerk and tested in the name of the president of the senate. The president of the senate and each senator are entitled to receive for their services and expenses while actually attending the court the same rate of compensation as an associate judge of the court of appeals is entitled by law to receive for his services and expenses as such judge for the same time. The other officers of the court, excepting the judges of the court of appeals, are entitled to the same compensation for their attendance thereon, and for traveling to and from the place where it is held, as is allowed them for attending a meeting of the senate, but no such compensation shall be received for attending the court during a session of the legislature.

Id., §§ 7, 9.

TITLE III.

OF THE COURTS OF OYER AND TERMINER.

- SECTION 21. Court of oyer and terminer in each county.
22. Its jurisdiction.
23. By whom held.
24. Writ or process.
25. Clerk.

§ 21. **Court of oyer and terminer in each county.** — There is in each of the counties of this state, except that for this purpose Fulton and Hamilton are deemed one county, a court of oyer and terminer, with the jurisdiction conferred by the next section and no other, but nothing contained in this section affects its jurisdiction in actions or proceedings now pending therein.

8 R. S., 459, §§ 20, 21.

(a) **Oyer and terminer a continuous court.** — The oyer and terminer is a permanent and continuous court; its successive sessions are terms of the same and not of distinct tribunals. (*Quimbo Appo v. People*, 20 N. Y., 531; 18 How., 850; and though held by different presiding judges, *People v. Naughton*, 7 Abb. [N. S.], 421.)

§ 22. (Amended 1882.) **Its jurisdiction.** — The court of oyer and terminer has jurisdiction :

1. To inquire, by the intervention of a grand jury, of all crimes committed or triable in the county ; but in respect of such minor crimes as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the oyer and terminer attaches only after the certificate mentioned in section fifty-seven of this Code ;

2. To try and determine all such crimes, and to try all persons indicted for the same ;

3 To deliver the jails of the county, or city and county, according to law, of all prisoners therein ;

4. To try any indictment found in the court of sessions of the county or the court of general sessions of the city and county of New York, which has been sent by order of the court of sessions or general sessions to and received by the court of oyer and terminer, or which has been removed from any court into the court of oyer and terminer if, in the opinion of that court, it is proper to be tried therein ;

5. To exercise the same jurisdiction as a court of sessions in a

cause or proceeding transferred according to sections forty and forty-one of this Code ;

6. By an order, entered in its minutes, to send any indictment found therein for a crime triable at the court of sessions of the county, or the court of general sessions of the city and county of New York, to such court ;

7. To grant new trials in all cases tried therein ;

8. To let to bail any person committed, before and after indictment found, upon any criminal charge whatever ;

9. To exercise the powers conferred upon it by other provisions of this Code and by special statutes.

3 R. S., 229, §§ 23-26.

(a) **When case transferred.** — The general sessions of New York have power to send to the oyer and terminer any untried indictment found in the court of sessions at any stage of the cause. (*People v. Shepherd*, 19 How., 446; 11 Abb., 59.)

(b) **Must be on notice.** — But not except on motion and notice. (*McFarland's case*, 7 Abb. [N. S.], 348.)

Not necessary that the order be actually entered on the minutes. (*People v. Myers*, 2 Hun, 6; 4 S. C., 292.)

(c) **May be remitted.** — An indictment found in the oyer and terminer and remitted to the sessions, may be again remitted back to the former court for trial. (*People v. Gay*, 10 Wend., 509.)

Where an indictment triable in the sessions has been removed into the oyer and terminer, that court may send it back to the sessions for trial. (*People v. General Sessions of New York*, 3 Barb., 144.)

(d) **May be tried at any court.** — An indictment sent to the oyer and terminer by the general sessions, may be tried at any time thereafter, though ordered to be sent to the next court of oyer and terminer. (*Neal v. People*, 42 N. Y., 270; 55 Barb., 551; 8 Abb. [N. S.], 314.)

(e) **Must be held at regular place.** — The judge has no power to adjourn the oyer and terminer to another place within the district, than that appointed for holding the court. (*Northrup v. People*, 37 N. Y., 203; reversing 50 Barb., 147.)

(f) **Judge cannot discharge prisoner.** — A judge in the supreme court in the oyer and terminer, has no power to discharge a prisoner in arrest on a civil process. (*People v. Brennan*, 61 Barb., 540.)

(g) **Nor sign exceptions after final adjournment.** — The judges of the oyer and terminer have no power to settle and sign a bill of exceptions after a final adjournment of the court. (*Birge v. People*, 5 Park., 9.)

(h) **Jurisdiction of oyer and terminer.** — The oyer and terminer has jurisdiction of a murder committed by a soldier in the actual service of the general government, within the body of the county; that a court-martial has concurrent jurisdiction makes no difference. (*People v. Gardiner*, 6 Park., 143.)

A motion to amend the record after a return has been made to a writ of

error, should not be made in the supreme court, but in the court below. (*Graham v. People*, 63 Barb., 468.)

(i) **Oyer could not grant new trial.**—A court of oyer and terminer had no power, by the common law, to grant new trials upon the merits, after conviction, in a capital case, nor, it seems, in any case of felony. (6 Term R., 625; Chitt. Cr. L., 532; *Appo v. People*, 20 N. Y., 581; *People v. Townsend*, 1 Johns. Cas., 104; Col. and C. Cas., 73; *Noah's case*, 8 C. H. Rec., 13; *People v. Comstock*, 8 Wend., 549; *People v. Dutchess* [O. and T.], 2 Barb., 282; see, also, *Willis v. People*, 32 N. Y., 715; 5 Park., 621.)

(j) **Judge cannot adjourn oyer by written order.**—The supreme court judge assigned to hold the oyer and terminer cannot adjourn the court to a future day by a written order to the sheriff without being present in court; but such adjournment may be ordered by any judge present. (*People v. Cleave*, 4 Abb. Cas., 256.)

§ 23. (Amended 1882.) **By whom held.**—A court of oyer and terminer is held by a justice of the supreme court, without an associate.

§ R. S., 231, § 89; New York Const., art. VI, § 7; §§ 232-239 Code Civil Procedure.

(a) **Court must convene on day appointed.**—If a quorum of judges do not appear on the day appointed, a court of oyer and terminer cannot be holden at a subsequent day. (*People v. Bradwell*, 2 Cow., 445.)

(b) **Court of appeals judge may preside.**—A justice of the supreme court may preside in the oyer and terminer during the period of his term of service in the court of appeals. (*McCarron v. People*, 13 N. Y., 74; 2 Park., 183.)

(c) **Judge of common pleas may.**—Under the act of 1839, an associate judge of the common pleas has authority, in connection with two aldermen, to hold a court of oyer and terminer. (*People v. White*, 22 Wend., 167; 24 id., 520; *People v. Colt*, 3 Hill, 432.)

(d) **Must be a full bench.**—If one of the justices holding an oyer and terminer leave the court pending a trial, and after being absent for a day return and take part in the subsequent deliberations of the court, without having read the evidence given in his absence, it is a mistrial, and such error cannot be waived by the prisoner in a capital case. (*Shaw v. People*, 3 Hun, 273; 5 S. C., 439; 63 N. Y., 86; *Blend v. People*, 41 N. Y., 604.)

Since the adoption of the Constitution of 1846, the organization of courts of oyer and terminer is within the control of the legislature. (*Smith v. People*, 47 N. Y., 880.)

A trial justice cannot testify. (*Dohring v. People*, 2 S. C., 458; 59 N. Y., 374.)

§ 24. **Writ or process.**—A writ or process issued out of the court of oyer and terminer must be tested in the name of a justice of the supreme court of the district, and may be directed by the court into any county of the state, as occasion requires.

§ R. S., 281, § 39; §§ 232-239 Code Civil Procedure.

§ 25. **Clerk.**—Except the clerk of the county of New York, the clerk of each county is, by virtue of his office, the clerk of the court of oyer and terminer held therein.

3 R. S., 231, §§ 42, 43.

(a) **Clerk not entitled to pay from the county.**—The clerk of the oyer and terminer is not entitled to compensation from the county for services rendered to the public. (*Mallory v. Supervisors of Cortland*, 2 Cow., 531.)

But he is entitled to compensation for engrossing the minutes of these courts which he had before officially taken. (*Doubleday v. Sup. of Broome*, 2 Cow., 533 · 18 Johns., 242.)

TITLE IV.

OF THE CITY COURTS.

- CHAPTER I. The city court of Brooklyn.
II. The superior court of Buffalo.
III. The other city courts.
IV. General provisions relating to city courts.

CHAPTER I.

THE CITY COURT OF BROOKLYN.

SECTION 26. Jurisdiction.

27. By whom held.

§ 26. **Jurisdiction.** — The city court of Brooklyn has criminal jurisdiction :

1. To the same extent and in the same manner, and with the same power as a court of oyer and terminer in the county of Kings in the indictment and trial of all offenses committed in the city of Brooklyn, whenever a bill of indictment for any such offense has been transmitted to the court by the court of sessions or court of oyer and terminer of the county of Kings ;

2. To remand any such indictment to the court of sessions or court of oyer and terminer of the county of Kings ;

3. To prosecute a forfeited recognizance taken by the court of sessions or court of oyer and terminer of Kings county, and binding the party or parties and witnesses to such indictment to appear in the city of Brooklyn.

Laws 1849, ch. 125, § 1 ; Laws 1870, ch. 470 ; and see N. Y. Const., art. VI, § 12 ; 3 R. S., 232, § 15 ; Code Civ. Proc., §§ 307-313.)

§ 27. **By whom held.** — Any one of the judges of the city court of Brooklyn may hold a court of criminal jurisdiction.

Id.

CHAPTER II.

THE SUPERIOR COURT OF BUFFALO.

SECTION 28. Jurisdiction.

29. By whom held.

30. Terms.

§ 28. **Jurisdiction.** — The superior court of Buffalo has criminal jurisdiction :

1. To inquire by a grand jury of all crimes committed in the city of Buffalo ;

2. To try and determine all indictments found therein, or sent thereto by another court for a crime committed in that city ;

3. To send any indictment pending therein undetermined to the court of oyer and terminer or to the court of sessions of the county of Erie, to be determined according to law ;

4. At a general term thereof exclusively to review upon motion on the indictment, with or without a bill of exceptions, its decisions and judgments, and grant new trials.

3 R. S., 271, §§ 39, 40, 43 ; Laws 1854, ch. 96, § 10 ; Laws 1870, ch. 313 ; Laws 1875, ch. 139 ; Code Civ. Proc., §§ 292-300.

§ 29. **By whom held.** — The court for the trial of indictments and the transaction of criminal business other than specified in subdivision 4 of the last section, may be held by any one of the justices thereof.

3 R. S., 271, § 42 ; see Code Civ. Proc., § 295.

§ 30. **Terms.** — There must be at least four terms of the court for the trial of indictments and the transaction of criminal business held in each year, to be appointed as prescribed in section 280 of the Code of Civil Procedure.

3 R. S., 271, § 42 ; see Code Civ. Proc., § 296.

CHAPTER III.

THE OTHER CITY COURTS.

SECTION 31. Other city courts.

32. By whom held.

§ 31. **Other city courts.** — The other city courts, having original criminal jurisdiction, are the recorder's court of Utica, the recorder's court of Oswego, and the mayor's court of Hudson. Their jurisdiction in criminal matters is defined by special statutes, and continues as thus defined.

3 R. S., 248, § 31, *et seq.*

§ 32. **By whom held.** — These courts for the exercise of their criminal jurisdiction must be held by the following officers :

1. The city courts of Utica and Oswego by the recorders of those cities respectively ;

2. The mayor's court of Hudson, by the mayor of that city.

3 R. S., § 1, *et seq.*

CHAPTER IV.

GENERAL PROVISIONS RELATING TO CITY COURTS.

SECTION 33. Indictments for offenses punishable with death to be sent to oyer and terminer.

34. Indictments for crime not punishable by death.

35. Same.

36. Court continued beyond terms.

§ 33. **Indictments for offenses punishable with death to be sent to oyer and terminer.** — When an indictment is found at a city court for a crime punishable with death, the court may send it to the next court of oyer and terminer of the county.

New.

§ 34. **Indictments for crime not punishable by death.** — A city court may also send an indictment found therein and remaining undetermined for a crime not punishable with death to the next court of oyer and terminer of the same county, to be determined according to law. But that court, if, in its opinion, the same is not proper to be tried therein, may remit it back to the

court by which it was sent, which must proceed thereon as if it had remained there.

New.

§ 35. **Same.** — When an indictment is found at a court of oyer and terminer, or of sessions, in a county embracing any of the cities in which a city court having original criminal jurisdiction is established, for an offense committed in that city, the court in which it was found may send it to the next city court in which it is triable, which must proceed to try and determine the indictment as if it had been found therein.

New.

§ 36. **Court continued beyond terms.** — If the trial of a cause be commenced before the expiration of the term of a city court the court may be continued beyond the term, to the completion of the trial and the rendering of judgment on the verdict.

3 R. S., 280, § 5 ; Laws 1875, ch. 3.

TITLE V.

OF THE COURTS OF SESSIONS.

CHAPTER I. The courts of sessions in general.

II. The courts of sessions in counties other than New York.

III. The court of general sessions of the city and county of New York.

CHAPTER I.

THE COURTS OF SESSIONS IN GENERAL.

SECTION 37. General provisions.

38. The courts of sessions.

§ 37. **General provisions.** — There is in each of the counties of this state a court denominated the court of sessions, with the jurisdiction conferred by the next two chapters and no other, but nothing contained in this section affects its jurisdiction in actions or proceedings now pending therein.

New York Const., art. VI, § 15.

§ 38. **The courts of sessions.**—The courts of Sessions are

1. The courts of sessions in counties other than New York ;
2. The court of general sessions in the city and county of New York.

3 R. S., 234, §§ 1, 58.

CHAPTER II.

COURTS OF SESSIONS IN COUNTIES OTHER THAN NEW YORK AND KINGS.

SECTION 39. Jurisdiction.

40. Indictments to be sent to oyer and terminer.
41. Other indictments may be sent to oyer and terminer.
42. By whom held.
43. Justice disqualified.
44. Same.
45. When and where held; jurors.
46. Jurors, how drawn.
47. Clerk.
48. Writ or process.
49. Compensation of justice.

§ 39. (Amended 1882.) **Jurisdiction.**—The courts of sessions embraced in this chapter have jurisdiction :

1. To inquire by the intervention of a grand jury of all crimes committed or triable in the county ; but in respect of such minor crimes as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the sessions attaches only after the certificate mentioned in section 57 of this Code ;

2. To try and determine indictments found therein or sent thereto by the court of oyer and terminer of the county, or by a city court in the county, for crimes not punishable with death ;

3. To hear and determine appeals from orders of justices of the peace under the provisions of law respecting the support of bastards ;

4. To examine into the circumstances of persons committed to prison as parents of bastards, and to discharge them in the cases provided by law ;

5. To try and determine complaints under the provisions of law respecting masters, apprentices and servants ;

6. To review the convictions of disorderly persons actually

imprisoned, and to execute the powers conferred and duties imposed by law in relation to those persons;

7. To continue or discharge recognizances, undertakings and bonds of persons bound to keep the peace or to be of good behavior and to inquire into and determine the complaints on which they were founded;

8. To compel relatives of poor persons and committees of the estates of lunatics to support such persons and lunatics in the cases and manner prescribed by law;

9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public;

10. To let to bail persons indicted therein for any crime triable therein as provided by law;

11. To let to bail persons committed to the prison of the county before indictment for any offense triable in the court;

12. To discharge persons who have remained in prison without indictment or trial in the cases prescribed by law;

13. To revoke licenses in the cases and mode prescribed by law;

14. To grant new trials in all cases tried therein;

15. To execute such other powers and duties as may be conferred by statute, or are now defined by special statute relating thereto.

3 R. S., 294, §§ 7, 10.

(a) **Sessions must be held according to law.** — Under the law a court of sessions cannot be held, except as therein prescribed. (*People v. Moneghan*, 1 Park., 570.)

(b) **When invalid.** — An order of the county judge appointing the county court merely, does not authorize the holding of a court of sessions; and no valid verdict can be found in a court of sessions held under it. (*People v. Wilcox*, 23 How., 297; *Cyphers v. People*, 31 N. Y., 373; 5 Park., 666.)

(c) **When void.** — Where one of the members of the court of sessions, granting an order of maintenance, is one of the individuals who, as superintendent of the poor, apply for the order, the court have no jurisdiction, and the proceedings and order are void. (*Baldwin v. McArthur*, 17 Barb., 414; *Converse v. Same*, 17 Barb., 410.)

(d) **Cannot award costs.** — Courts of sessions, unless authorized specially by statute, cannot award costs in bastardy proceedings. (*Wasburne v. Overseers of Hebron*, 9 Johns., 19.)

(e) **Cannot arraign on charge of murder.** — The court of sessions have no power to arraign a defendant and receive a plea to an indictment for murder. (*People v. McCraney*, 21 How., 149.)

(f) **Nor try case of Rape.** — Held, that they cannot try a charge of rape. (*People v. Porter*, 19 Wend., 192; 4 Park., 524.)

(g) **Nor nol proa. case without jurisdiction.** — They cannot order a *nolle prosequi* on an indictment for an offense of which they have not jurisdiction. (*People v. Porter*, 4 Park., 524.)

(h) **Nor grant new trials.** — The court of sessions, under the judiciary act of 1847, had no power to grant new trials. (*People v. Sess. of Wayne*, 1 Park., 369.)

(i) **May grant new trials** — Under the statute of 1857, they were given power to grant new trials. (Laws 1857, pp. 331, 332; *McFall v. People*, 13 Hun, 382.)

Held, however, that the statute should be strictly construed, etc. (*People v. Donnelly*, 21 How., 406.)

Such application must be made before judgment. (*Id.*)

Could not grant new trial on the merits, involving questions of law raised on the trial. (*People v. Montgomery*, 13 Abb. [N. S.], 207.)

(j) **History of courts of sessions.** — History of courts of sessions traced. (*People v. N. Y. Gen. Sess.* 15 Abb., 59; overruling *People v. Powell*, 14 id., 91.)

(k) **May set aside verdict.** — A court of sessions may set aside a verdict for irregularity. (*Gay v. Monroe Gen. Sess.*, 12 Wend., 272.)

May try robbery in first degree. (*Myers v. People*, 14 Hun, 416.)

§ 40. **Indictments to be sent to oyer and terminer.** — A court of sessions must send every indictment there found for a crime not triable therein to the court of oyer and terminer of the county, or to a city court having jurisdiction to try and determine the same.

3 R. S., 234, § 11; Laws 1861, p. 173, ch. 96; see § 344, *post*.

(a) **General sessions may transfer indictment for murder.** — An indictment for murder found in general sessions may be transferred to oyer and terminer for trial. (*Thompson v. People*, 6 Hun, 185; *Dolan v. People*, id. 493; 64 N. Y., 485.)

§ 41. **Other indictments may be sent to oyer and terminer.** — A court of sessions may send an indictment pending therein to the court of oyer and terminer of the same county, to be determined according to law, and if such indictment is remitted back without trial by the court of oyer and terminer, the court of sessions may proceed thereon.

3 R. S., 234, § 12; see § 344, *post*.

(a) **Removal to sessions.** — On error, an order for the removal of the case from the oyer and terminer to the court of sessions need not appear on the record. (*May v. People*, 12 Hun, 880.)

(b) **May remit back.** — The oyer and terminer may, in their discretion, remit back to the general sessions an indictment found in the sessions and removed by order of a circuit judge. (*People v. N. Y. Gen. Sess.*, 3 Barb., 144.)

(c) **May receive back.**—The oyer and terminer also may receive back from the general sessions and try indictments found in the oyer and terminer and sent to the sessions for trial. (*People v. Gay*, 10 Wend., 509.)

§ 42. **By whom held.**—A court of sessions must be held by the county judge, with two justices of sessions to be designated according to statute. If the justices of sessions, or either of them, fail to attend the commencement of, or during the term, or if his office at such time is or becomes vacant, the county judge by an order entered in the minutes, may designate any justice of the peace of the county to serve as justice of sessions during the term, or if the order is made by reason of non-attendance, until the absentee attends.

New York Const., art. VI, § 15; 1 R. S., 378; Id., 228, § 22; L. 1847, ch. 280; Laws 1851, ch. 444; 1 Laws 1870, ch. 3.

The provision of this section is not limited to cases in which one justice only is absent. (*Cyphers v. People*, 31 N. Y., 373; 5 Park., 666.)

(a) **May appoint a justice.**—However, if one of the justices of sessions, after hearing a portion of a trial, leave the bench, and the county judge appoints another to take his place, a conviction by the court so constituted would be erroneous. (*Bland v. People*, 41 N. Y., 604.)

So if one of the justices of sessions be called as a witness and give material testimony. (*Dohring v. People*, 2 S. C., 458.)

§ 43. **Justice disqualified.**—Whenever a justice of sessions is disqualified to act in any cause or proceeding pending in a court of sessions, the county judge must designate some other justice of the peace of the county, to act as member of the court during the trial or determination of such cause or proceeding.

3 R. S., 236, § 14; 3 R. S., 436, §§ 2, 7, 8.

(a) **May appoint associate justice.**—If a member of the court of sessions is absent or be disqualified from acting in a particular proceeding the county judge may supply the vacancy. (*Baldwin v. McArthur*, 17 Barb., 414.)

§ 44. **Justice disqualified.**—If the county judge is, for any cause, incapable of acting in any criminal action or proceeding pending in the court of sessions, the court must transfer the same to the court of oyer and terminer of the county, or to a city court having jurisdiction of such an action or proceeding.

3 R. S., 236, § 13.

§ 45. **When and where held; jurors.**—A court of sessions must be held at such times as the county judge of the county, by order, designates, and at the place where the county courts are

held for the trial of issues of fact by a jury. Such order must designate the terms at which a grand or petit jury, or both, or neither, is required to attend; and neither a grand jury nor a petit jury is required to be drawn, or summoned to attend a term thus designated to be held without a jury. The order must be published in a newspaper printed in the county, for four successive weeks previous to the time of holding the first term under such order.

3 R. S., 234, § 1; Laws 1851, p. 825; Laws 1847, pp. 331, 332.

(a) **When held.**— Under the act of 1851, a court of sessions cannot be held except in pursuance of a previous order of the county judge, made under the authority of that act and in conformity therewith. (*People v. Monaghan*, 1 Park., 570.)

(b) **What sufficient notice.**— What is a sufficient appointment, under the statute, of the holding of the court of sessions. (*People v. Wilcox*, 23 How., 297.)

The omission of a county judge to designate, in an order for terms of the court of sessions, under the act of 1851, any terms to be held without a jury, does not render the court null or deprive it of power to impanel a grand jury. (*Cyphers v. People*, 31 N. Y., 373; 5 Park., 666.)

§ 46. **Jurors, how drawn.**— If a county judge fail to designate the term at which a grand and petit jury is required to attend, the grand and petit jurors must be drawn and summoned for each term mentioned in the order mentioned in the last section.

3 R. S., 234, § 1.

(a) **Effect of improper notice.**— The omission of a county judge to designate, in an order for terms of the court of sessions, any terms to be held without a jury, does not render the court null or deprive it of power to impanel a grand jury. (*Cyphers v. People*, 31 N. Y., 373; 5 Park., 666.)

§ 47. (Amended 1882.) **Clerk.**— Except in the city and county of New York and the county of Kings, the clerk of the county is the clerk of the court of sessions thereof.

3 R. S., 236, § 20; Laws 1874, ch. 90.

§ 48. **Writ or process.**— Every writ or process issued out of a court of sessions may be tested on any day of the term in which the court is sitting, and be made returnable on any other day of the same term, or at the next term.

3 R. S., 236, § 18.

§ 49. **Compensation of justice.**— A justice of sessions is entitled to receive three dollars for each day's attendance at a

court of sessions or court of oyer and terminer, and to five cents a mile for traveling expenses in coming to and returning from the court.

§ R. S., 240, § 53; Laws 1839, ch. 496.

CHAPTER III.

THE COURT OF GENERAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK AND THE COURT OF SESSIONS IN THE COUNTY OF KINGS.

SECTION 50. This court continued; proceedings now pending.

51. Its jurisdiction.
52. Division of court.
53. Parts, by whom held.
54. When held and its duration.
55. Accommodation for court and officers.

§ 50. (Amended 1882.) **This court continued; proceedings now pending.** — The courts known as the court of general sessions in and for the city and county of New York, and the court of sessions in and for the county of Kings are continued, with the jurisdiction conferred by the next two sections and no other. But nothing contained in this section affects their jurisdiction of actions and proceedings now pending therein.

§ R. S., 240, §§ 58, 59, 60, *et seq.*; Laws 1835, ch. 337; Laws 1857, ch. 124, § 5; Laws 1851, ch. 441; Laws 1839, ch. 206; Laws 1862, ch. 10; Laws 1860, ch. 506.

§ 51. (Amended 1882.) **Its jurisdiction.** — The court of general sessions of the city and county of New York and the court of sessions of the county of Kings have jurisdiction :

1. To try, determine and punish according to law, all crimes cognizable within their respective counties, including crimes punishable with death or imprisonment in the state prison for life ;
2. To exercise, in cases arising in their respective counties, the same powers as are conferred by this Code upon courts of sessions in other counties ;
3. To try and determine any indictment found in the court of oyer and terminer of the county, which has been sent by order of that court to and received by the court of sessions therein ; and

4. To exercise such powers as are now prescribed by special statute relating thereto.

Id., §§ 66, 67, 70; see, also, Session Laws cited under last section.

(a) **Case may be removed after arraignment.**—An indictment for murder found in the general sessions of New York may be transferred to the oyer and terminer for trial either before or after arraignment. (*Thompson v. People*, 6 Hun, 185; *Dolan v. People*, Id., 493; 64 N. Y., 485.)

(b) **Order of removal not part of record.**—On error, an order for the removal of the case from the oyer and terminer to the court of sessions need not appear on the record. (*May v. People*, 12 Hun, 880.)

(c) **General sessions may discharge jury.**—Has power to discharge a jury in case of felony, if unable to agree. (*People v. Goodwin*, 18 Johns., 187.)

(d) **May grant new trials.**—The court of general sessions of New York has power to grant new trials upon the merits. (*People v. Powell*, 9 Abb. Pr., 91; *Loneragan v. People*, 39 N. Y., 89; reversing 50 Barb., 266; 6 Park., 209; and overruling *People v. N. Y. Gen. Sess.*, 15 Abb., 59; and *Ex parte Marks*, 14 id., 105 n.)

(e) **Has jurisdiction on Governor's Island.**—The general sessions have jurisdiction over offenses committed on Governor's Island. (*People v. Lent*, *Wheeler's C. Cases*, 548.)

May try a prisoner on a charge of stealing corporation notes which were in circulation. (*Linnenden's case*, 1 C. H. Rec., 80.)

(f) **Must send to oyer and terminer certain cases.**—It is the duty of the New York court of sessions to send to the oyer and terminer all indictments for offences which they cannot try. (*People v. Shepard*, 11 Abb. Pr., 59; 19 How., 446.)

(g) **Must be on motion.**—The New York general sessions will not transfer to the oyer and terminer indictments found in the sessions except on motion, and on notice to the district attorney or the accused, as the case may be. (*McFarland's case*, 7 Abb. [N. S.], 348.)

(h) **May resentence prisoner.**—After affirmance in court of appeals, court of sessions may resentence a prisoner. (*Walters v. People*, 19 Abb., 212.)

(i) **Has same power as oyer and terminer.**—New York general sessions has all the power of a court of oyer and terminer. (*People v. Goodwin*, 18 Johns., 187.)

§ 52. **Division of court.**—The court of general sessions of the city and county of New York is divided into three parts.

3 R. S., 241, § 62.

§ 53. (Amended 1882.) **Parts, by whom held.**—Any one of the three parts of the court of general sessions of the city and county of New York may be held by the recorder of the city of New York, or the city judge, or the judge of the court of general sessions. A judge of the court of common pleas for the city and county of

New York may also hold it. The court of sessions of the county of Kings must be held by the county judge of the county of Kings, with two justices of the sessions, designated according to statute.

Id., § 58.

§ 54. **When held and its duration.** — Each part of the court of general sessions in and for the city and county of New York, may be held each month, commencing on the first Monday and continuing so long as, in the opinion of the judge sitting and of the district attorney, the public interest requires, but one part only is required to be held during the months of July and August, and two parts only during the rest of the year.

Id., § 62; Laws 1859, ch. 208.

(a) **May continue sessions and conclude case.** — The provision of the act of 1859 authorizing the court of sessions of any county of this state to continue its sittings so long as may be necessary for the determination of any cases, is applicable to the court of general sessions of New York. (*Lavenberg v. People*, 27 N. Y., 336; 26 How., 202; 5 Park., 414; *Ferris v. People*, 81 How., 140; 35 N. Y., 125; 48 Barb., 17; 1 Abb. [N. S.], 193.)

While prolonging its session for the purpose of concluding a trial, the court may pass sentence on a prisoner convicted before the expiration of the term. (*Lavenberg v. People*, 27 N. Y., 336.)

§ 55. (Amended 1882.) **Accommodation for court and officers.** — The courts have the same power to direct suitable provisions to be made for their accommodation as is now possessed by the supreme court. The recorder, city judge, and judge of the court of general sessions of the city and county of New York must appoint a clerk, and not more than four deputy clerks, two interpreters and two stenographers. The clerk and deputy clerks so appointed must act also as clerks and deputy clerks of the court of oyer and terminer in the city and county of New York. The county judge of the county of Kings shall, by writing, filed with the county clerk, appoint a clerk of the court of sessions of the county, who shall be removable by him at any time, for incompetency, negligence or official misconduct, in which case he may appoint another. The county clerk of the county must deliver to the clerk of the sessions all books and records of the court of sessions in his custody. The clerk of the sessions may appoint a deputy clerk, and not more than two assistants, and such clerk, deputy and assistants shall receive salaries, respectively, equal to

those now paid to the deputy clerk and assistant clerk serving in that court, payable monthly by the treasurer of the county. Such court of sessions shall by an order entered in its minutes adopt a seal, which seal when so adopted shall be the seal of the court of sessions of the county of Kings.

3 R. S., 241, § 56.

TITLE VI.

OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.

CHAPTER I. The special sessions, except in the cities of New York and Albany.

II. The special sessions in the city and county of New York.

III. The special sessions of the city of Albany.

IV. The police courts.

CHAPTER I.

THE SPECIAL SESSIONS EXCEPT IN THE CITIES OF NEW YORK AND ALBANY.

SECTION 56. Jurisdiction of courts.

57. Exclusive jurisdiction.

58. Limitation.

59. Trial and punishment of certain crimes.

60. Special sessions in Brooklyn.

61. Id., in Oswego.

62. By whom held.

63. Recorder of a city to hold court.

§ 56. (Amended 1882.) **Jurisdiction of courts.**—Subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York and the city of Albany, have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows:

1. Petit larceny, charged as a first offense.
2. Assault in the third degree.
3. Racing, running or testing the speed of any animal within one mile of the place where any court is held.
4. Wrongfully severing any produce or article from the freehold, not amounting to grand larceny.

5. Selling poisonous substances not labeled as required by law.

6. Wrongfully and maliciously removing, defacing or cutting down monuments or marked trees.

7. Wrongfully destroying or removing mile-stones, mile-boards or guide-boards, or altering or defacing any inscription thereon.

8. Wrongfully destroying any public or toll-gate or turnpike gate.

9. Intoxication of a person engaged in running any locomotive engine upon any railroad, or while acting as a conductor of a car, or train of cars, on any such railroad.

10. Setting up or drawing unauthorized lotteries, or printing and publishing an account of any such illegal lottery, game, or device, or selling lottery tickets, or procuring them to be sold, or offering for sale or distributing any property depending upon any lottery, or for selling any chances in any lottery contrary to the provisions of law.

11. Unlawfully running, trotting or pacing horses or any other animals.

12. Offenses against the laws relating to excise, and the regulation of taverns, inns and hotels.

13. Making or selling slung-shot or any similar weapon.

14. Unlawfully disclosing the finding of an indictment.

15. Unlawfully bringing to or carrying letters from any state prison.

16. Unlawfully destroying or injuring any mill-dam or embankment necessary for the support of such dam.

17. Unlawfully injuring any telegraph wire, post, pier, abutment, materials or property belonging to any line of telegraph.

18. Unlawfully counterfeiting any representation, likeness, similitude or copy of private stamp, wrapper or label of any mechanic or manufacturer.

19. Malicious trespass on lands, trees or timber, or injuring any fruit or ornamental or shade tree.

20. Maliciously breaking or lowering any canal walls, or wantonly opening any lock-gate, or destroying any bridge or otherwise unlawfully injuring such canal or bridge.

21. Unlawfully counterfeiting or defacing marks on packages.

22. Unlawfully setting fire to wood or fallow land, or allowing the same to extend to lands of others, or unlawfully refusing to extinguish any fire.

23. Unlawfully or negligently cutting out, altering or defacing any mark on any logs, timber, wood or plank, floating in any waters of this state, or lying on the banks or shores of any such waters, or at any saw-mills, or on any island where the same may have drifted.

24. Unlawfully frequenting or attending a steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction room, store, auction sale at private residence, passenger car, hotel restaurant or at any other gathering of people.

25. Unlawfully taking and carrying away the oysters of another, lawfully planted upon the bed of a river, bay, sound or other waters within the jurisdiction of this state.

26. Removing property out of the county, with intent to prevent the same from being levied upon by execution, or secreting, assigning, conveying or otherwise disposing of property, with intent to defraud any creditor, or to prevent the property being made liable for the payment of debts, or for receiving property with such intent.

27. Unlawfully selling or giving to any Indian spirituous liquors or intoxicating drinks.

28. Driving a carriage upon any turnpike, road or highway for the purpose of running horses.

29. Cruelty to animals contrary to law.

30. Cheating at games.

31. Winning or losing at any game or play, or by any bet, as much as twenty-five dollars within twenty-four hours.

32. Selling liquors in a court-house or jail contrary to law.

33. Crimes against the provisions of existing laws for the prevention of wanton or malicious mischief.

34. Such other jurisdiction as is now provided by special statute or municipal ordinance authorized by statute.

3 R. S., 1004, § 1; Id., 1008, § 24; ch. 390, Laws 1879; New York Const., art. VI, § 26.

(a) **History and powers of special sessions.** — History of court of special sessions, its powers and jurisdiction. (*People v. Kennedy*, 2 Park., 312; also, *Wynhamer v. People*, 13 N. Y., 378.)

(b) **When county judge may act.** — A county judge cannot as such, be a member of the special sessions, unless the prisoner was originally brought before him for examination. (*People v. Tracy*, 9 Wend., 265.)

(c) **May discharge a jury on disagreement.** — If one jury cannot agree, the court may discharge them and summon another. (*Vanderwerker v. People*, 5 Wend., 530.)

(d) **Court need not advise prisoner.** — Not essential to a valid conviction, that the court inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. (*People v. Goodwin*, 5 Wend., 251.)

(e) **Must have six jurors.**—The court of special sessions has no authority to try a person by a jury of less than six, though both he and the prosecutor consent thereto. (*Germond v. People*, 1 Hill, 343.)

(f) **Cannot imprison absolutely for the non-payment of fine.** (*Matter of Sweetman*, 1 Cow., 144.)

(g) **Warrant must name officer.**—The warrant of the court must point out the officer who is to execute it. (*Russell v. Hubbard*, 6 Barb., 654.)

(h) **Record must show court in session.**—A justice holding special sessions cannot render judgment except when his court is in session, and the record must show this. (*Lattimore v. People*, 10 How., 336.)

A return that the court was kept open on Sabbath, construed to mean that the case was continued to Monday. (*Vanderwerker v. People*, 5 Wend., 530.)

§ 57. (Amended 1882.) **Exclusive jurisdiction.**—Upon filing with the magistrate before whom is pending a charge for any of the crimes specified in the last section, a certificate of the county judge of the county, or of any justice of the supreme court, that it is reasonable that such charge be prosecuted by indictment, and fixing the sum in which the defendant shall give bail to appear before the grand jury; and upon the defendant giving bail as specified in the certificate, all proceedings before the justice shall be stayed; and he shall, within five days thereafter, make a return to the district attorney of the county of all proceedings had before him upon the charge, together with such certificate and the undertaking given by the defendant thereon, and the district attorney shall present such charge to the grand jury.

Laws 1879, ch. 390.

The provision of the act of 1879 giving to courts of special sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance charges of petit larceny not charged as a second offense, is constitutional and valid, and said courts can now try the offenses specified. (*People ex rel. Comaford v. Dutcher*, 83 N. Y., 240; reversing 20 Hun, 281, on other courts; see, also, *Devine v. People*, 20 Hun, 98.)

Jurisdiction of said court may hereafter be increased. (*Id.*)

§ 58. (Amended 1882.) **Limitation.**—When a person is brought before a magistrate charged with the commission of any of the crimes mentioned in section fifty-six, and asks that his case be presented to the grand jury, the proceedings shall be adjourned for not less than five nor more than ten days; and if on or before the adjourned day the certificate mentioned in section fifty-seven is not filed with the magistrate before whom the charge is pending, and bail given by the defendant as therein prescribed, the magistrate shall proceed with the trial, and when the defendant is brought

before the magistrate, it shall be the duty of the magistrate to inform him of his rights under section fifty-seven and this section.

3 R. S., 1005, §§ 2, 3.

(a) **Court need not advise prisoner as to his right to jury.**—It is not essential to a valid conviction that the court inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. (*People v. Goodwin*, 5 Wend., 251.)

(b) **What sufficient election.**—By electing to be tried in special sessions, prisoner waives all objections to jurisdiction. (*Gill v. People*, 3 Hun, 187; 60 N. Y., 643; see, also, *People v. Mallon*, 89 How., 454.)

§ 59. (Amended 1882.) **Trial and punishment of certain crimes.**—A court of special sessions having jurisdiction in the place where any of the crimes specified in section fifty-six is committed, has jurisdiction to try and determine a complaint for such crime, and to impose the punishment prescribed upon conviction, unless the defendant obtains the certificate and gives the bail mentioned in section fifty-seven.

Id.

(a) **Conviction, when erroneous.**—If neither the complaint for larceny, nor the warrant, state the value of the property stolen, and there be no mention of the place where the offense arose, a conviction by the special sessions is erroneous. (*Howell v. People*, 2 Hill, 281.)

(b) **Warrant must name officer.**—The warrant of the court must also point out the officer who is to execute it. (*Russell v. Hubbard*, 6 Barb., 654.)

§ 60. **Special sessions in Brooklyn.**—A court of special sessions in the city of Brooklyn has also jurisdiction to try any person arrested in the county of Kings, and brought before it charged with an affray or riot, committed within the county.

New.

§ 61. **Special sessions in Oswego.**—The court of special sessions in the city of Oswego, where held by the recorder, has also jurisdiction over all cases of offenses, crimes against public decency, selling unwholesome provisions, cheats, breaches of the peace, disobeying the commands of officers to render assistance in criminal cases, obstructing officers in the discharge of their duties, adulterating distilled spirits, not delivering marked property, defacing marks or putting false marks on floating timber, all violations against the laws and ordinances of or applicable to the city, when such violation is a misdemeanor, and all attempts

to commit any crimes herein named or referred to when such attempt is a misdemeanor.

3 R. S., 253, § 60; Laws 1849, ch. 134; Laws 1868, ch. 866.

§ 62. (Amended 1882.) **By whom held.** — Unless provision is otherwise made by law, a court of special sessions must be held by one justice of the peace of the town or city in which the same is held, and sections two hundred and ninety-three, two hundred and ninety-four, two hundred and ninety-five, three hundred and ten, three hundred and thirty-two, three hundred and thirty-three, three hundred and thirty-four, three hundred and thirty-five, three hundred and thirty-six, three hundred and thirty-seven, three hundred and thirty-eight, three hundred and thirty-nine, three hundred and forty, three hundred and forty-one, three hundred and forty-two, and three hundred and fifty-nine to four hundred and fifty, both inclusive, shall apply as far as may be to proceedings in all courts of special sessions or police courts.

3 R. S., 1005, § 2.

§ 63. **Recorder of a city to hold court.**—A recorder of a city has power to hold a court of special sessions therein.

Id., 1008, § 23; ch. 243, Laws, 1840.

CHAPTER II.

THE SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

SECTION 64. Jurisdiction.

65. Officers, how appointed.

66. Term of office.

67. Court, when held.

§ 64. **Jurisdiction.**—The court of special sessions in the city and county of New York has jurisdiction:

1. To try and determine according to law all complaints for misdemeanors, unless the defendant elects to be tried at the court of general sessions, or the court of special sessions sends the case to the court of general sessions for trial;

2. To remit fines imposed by it, and in place of the fine remitted, substitute, in its discretion, imprisonment;

3. By an order entered in its minutes, to declare forfeited the recognizance of a defendant, taken by the court, to appear thereat, upon his failure so to appear;

4. To impose the same punishment as is authorized by statute to be inflicted in like cases tried in the court of general sessions of the peace of that city and county;

5. By warrant attested in the name of any one of the justices authorized to hold the court, signed by the clerk thereof, and entered in the minutes of the court, to enforce its judgments and orders; to bring before the court all accused persons for trial and judgment in all cases in which it has jurisdiction; to issue subpoenas for the attendance of witnesses, attachments for contempt, and other process necessary for the proper conduct of the court;

6. To require the principal in a recognizance to appear at the court, and enter into a further recognizance to keep the peace, or to be of good behavior, or both, toward the people of the state, for a period not exceeding one year, and in default thereof to commit him to prison till he be discharged therefrom according to law.

3 R. S., 1009, §§ 29-42; Laws 1858, ch. 282; Laws 1859, ch., 491; Laws 1865, ch. 563; Laws 1866, ch. 409; 1 Laws 1871, ch. 302.

The court of special sessions have no jurisdiction of a prisoner who, on his committal, entered into a recognizance to appear at general sessions. (*People ex rel. Doyle v. Johnson*, 10 Abb., 294; 19 How., 11.)

(a) **Special sessions; how constituted.**—Three justices are necessary to constitute a court of special sessions in the city of New York. (Laws 1859, ch. 282.)

(b) **Conviction by two void.**—Hence a commitment and conviction by two only is void as without jurisdiction. (*Devine's case*, 11 Abb., 90; 21 How., 80; 5 Park., 62.)

Organization and powers of special sessions in New York. (1 Laws 1870, ch. 30; also, *Id.*, ch. 983, § 49.)

(c) **Must waive right to jury.**—The special sessions cannot acquire jurisdiction to try a prisoner for a crime, unless he expressly waives the right to be tried by a jury. (*People v. Mallon*, 39 How., 454.)

§ 65. **Officers, how appointed.**—The police justices of the city and county of New York, by the vote of a majority, have the exclusive power to appoint the clerk, deputy clerk, stenographer, interpreter and other officers of the court of special sessions in the city and county of New York.

Laws 1865, ch. 563, §§ 2, 3; 1 Laws 1872, ch. 373.

§ 66. **Term of office.** — The term of office of the clerk and deputy clerk of the court of special sessions in the city and county of New York is the same as the term of office of the police justices of that city.

Id.

§ 67. **Court, when held.** — The court of special sessions in the city and county of New York, may be held as often and at such times as the justices thereof may think expedient.

3 R. S., 1009, § 81.

CHAPTER III.

THE SPECIAL SESSIONS IN THE CITY OF ALBANY.

SECTION 68. Jurisdiction.

69. By whom held.

70. Inability of judge.

71. Officers to attend.

72. Clerk.

73. Court, when and where held.

§ 68. (Amended 1882.) **Jurisdiction.** — The court of special sessions in the city of Albany has jurisdiction :

1. To try and determine all cases of petit larceny charged as a first offense, and all misdemeanors, not being infamous crimes, committed within the city ;

2. To take recognizances, to appear before the court at a succeeding term from persons charged with a crime or misdemeanor, triable therein ;

3. To impose and enforce sentence of fine or imprisonment, or both, in the discretion of the court, in all cases within its jurisdiction, upon conviction, to the same extent as the court of sessions of the county of Albany could do in like cases ;

4. To punish a contempt of court in the same manner and to the same extent as the court of oyer and terminer of the county could do in like cases ;

5. In cases where a jury trial is demanded by a defendant, to draw from the jury box containing the names of jurors who reside in the city of Albany such number of names as the recorder or county judge may direct, and to require the sheriff of the county to summon the persons so drawn to appear at the time

designated for trial, to impanel a jury of twelve men, to require the attendance of additional jurors and to punish a juror or witness neglecting to appear, in the same manner and to the same extent as the court of oyer and terminer of the county could do in like cases;

6. On motion of the district attorney, to issue a warrant for the arrest of a person who neglects to appear agreeably to the requirements of a recognizance to appear thereat, commanding the officer executing the same to bring the party forthwith before the court, if in session, otherwise to commit him to the common jail of the county, there to remain until delivered by due course of law.

Laws 1872, ch. 284, and amendments; also Laws 1881, ch. 864.

(a) **Jurisdiction of special sessions in Albany.**—As to jurisdiction of special sessions in Albany, see *Haggerty v. People* (6 Lans., 832).

(b) **Has jurisdiction of petit larceny.**—Though a police magistrate have power to try a person brought before him for petit larceny, the special sessions has also power to try him. (*People v. Thayer*, 16 Barb., 362.)

§ 69. (Amended 1882.) **By whom held.**—Upon charges for offenses triable by this court, the police magistrate or any other magistrate in the city hearing the same, shall, if offered, take recognizances in the cases provided by law returnable at the court of special sessions; and all such recognizances as shall have been so taken shall be returned to and filed with the district attorney of the county of Albany. If no such recognizance be offered, the magistrate or magistrates shall commit the defendant to the common jail of the county of Albany until he shall be thence delivered in due course of law, and the trial of such person shall be had before the court of special sessions, except that where a police justice or other magistrate in this city has jurisdiction, the defendant may elect to be tried before such police justice or other magistrate.

Laws 1872, ch. 284, § 1.

(a) **Court need not be unanimous.**—Where a person charged with petit larceny elects to be tried by a court of special sessions, it is not necessary that all the members of the court concur in a verdict; the majority govern. (*People v. Wandell*, 21 Hun, 515.)

§ 70. (Amended 1882.) **Inability of judge.**—Whenever a person is brought before a police justice or other magistrate of the city, charged with any of the following crimes, viz.: Petit larceny charged as a first offense, offenses against the laws relating to excise and the

regulation of taverns, inns and hotels, offenses being misdemeanors against the laws relating to gaming. Assaults upon, and interference with, a public officer in the discharge of his duty, and it shall appear to the magistrate that the crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must order him to be held to answer the charge before the court of special sessions.

Id., § 14.

§ 71. (Amended 1882.) **Officers to attend.** — The court of special sessions in the city of Albany must be held by the recorder of the city, with or without one or more of the justices of the peace to be associated with him. In case of the absence or inability of the recorder to act, the county judge of the county of Albany must act in his place. If the recorder and county judge are both unable, by reason of absence or other cause, to hold the court, the clerk must adjourn the court to the next following Tuesday, and continue such adjournments until the recorder or county judge attends. Not more than two officers shall be designated or appointed by the sheriff or other authority to attend the court of special sessions of the city of Albany, unless the court shall, by an order entered in its minutes, require the attendance of a greater number.

Id., § 26.

§ 72. **Clerk.** — The county clerk of Albany county is clerk of the court of special sessions of the city of Albany, and must attend the same in person or by deputy.

Id., § 8.

§ 73. **Court, when and where held.** — The court of special sessions of the city of Albany must be held at the city hall in the city of Albany on Tuesday of each week, and may be held and continued for such length of time as it deems proper.

Id., § 1.

CHAPTER IV.

THE POLICE COURTS.

SECTION 74. Jurisdiction.

75. Election of justices.

76. Justice to take and file oath of office, etc.

77. Justice, how to hold office.

78. Compensation of justice.

§ 74. (Amended 1882.) **Jurisdiction.**—Police justices have such jurisdiction, and such only, as is specially conferred upon them by statute. The courts held by police justices are called police courts, and courts of special sessions are also called police courts, and are so designated in different parts of the Code.

New.

§ 75. **Election of justices.**—Upon the application in writing of not less than twenty-five electors, inhabitants of any incorporated village in this state in which no provision now exists for the election of a police justice, the board of trustees of such village may determine, by resolution to be entered in their minutes of proceedings, that a police justice should be elected for such village; and, if they so determine, the electors of the village may, at their next annual election, or at a special election to be called for the purpose, and to be conducted in the same manner as the annual election, choose a police justice, who must be a resident elector of the village; and thereafter a police justice must be elected in such village, at the annual charter election next preceding the expiration of a regular term, or at the next annual election after a vacancy, on the same ticket with the other elective village officers. Any vacancy must be filled by appointment by the board of trustees of the village.

2 R. S., 596, § 17; Id., 609, § 1; Laws 1871, ch. 688.

§ 76. **Justice to take and file oath of office, etc.**—A police justice elected or appointed as prescribed in the last section must, before entering upon the duties of his office, and within fifteen days after receiving notice from the village clerk of his election or appointment take, before the clerk, the constitutional oath of office, and file the same with the clerk, together with a bond with such sureties and in such amount as shall be

approved by the board of trustees of the village, conditioned for the faithful performance of his official duties.

2 R. S., 596, § 20.

Though to assume the duties of office without taking the required oath of office is a misdemeanor, yet such person is an officer *de facto*, and not a trespasser in issuing process. (*Weeks v. Ellis*, 2 Barb., 820.)

Form of oath of office, New York Const., art. XII, § 1.

§ 77. (Amended 1882.) **Justice; how to hold office.** — A police justice elected or appointed, as prescribed in section seventy-five, holds his office as follows:

1. If elected at the first election held after the creation of the office, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office until and including the thirty-first day of December in the third year succeeding his election;

2. If elected at any subsequent election, except as prescribed in the next subdivision, he must enter upon the duties of his office on the first day of January succeeding his election, and may hold his office for three years;

3. If elected to fill a vacancy, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office for the unexpired term;

4. If appointed, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office until his successor is elected and qualifies.

New.

§ 78. **Compensation of justice.** — A police justice cannot retain to his own use any costs or fees, but may receive for his services an annual salary, to be fixed in villages by the board of trustees, and in cities by the common council, except where the same is otherwise fixed by law; and such salary shall not be increased or decreased during his term of office.

New.

PART II.

OF THE PREVENTION OF CRIME.

TITLE I. OF LAWFUL RESISTANCE.

II. OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

TITLE I.

OF LAWFUL RESISTANCE.

CHAPTER I. General provisions respecting lawful resistance.

II. Resistance by the party about to be injured.

III. Resistance by other parties.

CHAPTER I.

GENERAL PROVISIONS RESPECTING LAWFUL RESISTANCE.

SECTION 79. Lawful resistance; by whom made.

§ 79. **Lawful resistance; by whom made.**— Lawful resistance to the commission of a crime may be made :

1. By the party about to be injured ;
2. By other parties.

New.

CHAPTER II.

RESISTANCE BY THE PARTY ABOUT TO BE INJURED.

SECTION 80. In what cases; to what extent.

§ 80. **In what cases; to what extent.**— Resistance sufficient to prevent the crime may be made by the party about to be injured :

1. To prevent a crime against his person ;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

New. See, also, Penal Code, § 223, and cases there cited.

(a) **May kill an assailant in self-defense.**— One without fault, if attacked by another, may kill his assailant if the circumstances be such as

to furnish reasonable ground for apprehending a design to take his life or do him great bodily harm, though in point of fact there was no such design. (*Shorter v. People*, 2 N. Y., 193; 4 Barb., 460; *Patterson v. People*, 46 Barb., 625; *People v. Lamb*, 54 Barb., 342; 2 Keyes, 360; 2 Abb. [N. S.], 148; *People v. Austin*, 1 Park., 154; 7 N. Y. Leg. Obs., 117; *People v. Cole*, 4 Park., 85; *Pfornner v. People*, 4 id., 558; *Uhl v. People*, 8 Park., 410.)

(b) **Must avoid danger if possible.**—However, the right of self-defense does not arise until he has done everything in his power to avoid its necessity. (*People v. Sullivan*, 7 N. Y., 396; *People v. Cole*, 4 Park., 85.)

(c) **Must first retreat.**—The person charged must first have retreated as far as possible. (*People v. Harper*, Edm. S. C., 180; *Shorter v. People*, 2 N. Y., 193; 4 Barb., 460.)

(d) **May use all necessary force to prevent a felony.**—One who is opposing the consummation of a felony may lawfully use all necessary force for that purpose, and resist all attempts to inflict bodily harm upon himself, even to the killing of the felon. (*Ruloff v. People*, 45 N. Y., 218; 5 Lans., 261; 11 Abb. [N. S.], 245; *People v. Hand*, 4 Alb. L. J., 91.)

A peace officer, in case of felony, can only justify taking life by showing the actual commission of the crime and the positive necessity of taking life in order to arrest or detain the felon. (*Conraddy v. People*, 5 Park., 234.)

(e) **Need not first call on the authorities.**—A party assailed is not deprived of the right of self-protection by an omission to invoke the protection of the authorities against an anticipated assault. (*Evers v. People*, 3 Hun, 716; 6 S. C., 156; 68 N. Y., 625.)

(f) **Trespasser may defend himself.**—Even a trespasser may use self-defense against unreasonable and unnecessary violence in ejecting him. (*People v. Gulick*, Lalor, 229.)

(g) **May defend his goods.**—A person may use as much force as is necessary to prevent the taking of his goods by a wrong-doer. (*Gyre v. Culver*, 47 Barb., 592.)

(h) **May defend his premises.**—A person may use all necessary force in defense of his premises. (*Harrington v. People*, 6 Barb., 607; *Corey v. People*, 45 Barb., 262; *Wood v. Phillips*, 48 N. Y., 152.)

(i) **In other states and at common law.**—The right of resistance is based on necessity. (27 Cal., 572.) It arises where one manifestly intends to commit a felony on the person, property or habitation of another. (9 Iowa, 188; 20 id., 560; 32 id., 36; 8 Bush, 481; 28 Ala., 28; 6 Bush, 312; 8 Mich., 150; 18 Ga., 194; 1 Ohio St., 66; Thach. C. C., 471; 15 Ohio St., 47; 1 Car. & P., 319; 8 Cal., 841.)

This principle of employing force does not apply to the retaking of property. (11 N. H., 450.)

Illegal official action may be forcibly resisted. (8 Pick., 188; 11 Price, 235; 128 Mass., 420.)

CHAPTER III.

RESISTANCE BY OTHER PARTIES.

SECTION 81. In what cases.

§ 81. **In what cases.**— Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the injury.

New.

TITLE II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

CHAPTER I. Intervention of public officers in general.

II. Security to keep the peace.

III. Police in cities and villages, and their attendance at exposed places.

IV. Prevention and suppression of riots.

CHAPTER I.

INTERVENTION OF PUBLIC OFFICERS IN GENERAL.

SECTION 82. In what cases.

83. Persons acting in their aid, justified.

§ 82. **In what cases.**— Crimes may be prevented by the intervention of the officers of justice :

1. By requiring security to keep the peace ;
2. By forming a police in cities and villages, and by requiring their attendance in exposed places ;
3. By suppressing riots.

New. (See §§ 84-101; 100, 101 and 102-117, *post.*)

§ 83. **Persons acting in their aid, justified.**— When the officers of justice are authorized to act in the prevention of crime, other persons who, by their command, act in their aid, are justified in so doing.

New. (See Penal Code, § 223, subd. 1.)

CHAPTER II.

SECURITY TO KEEP THE PEACE.

- SECTION 84. Information of threatened crime.
85. Examination of complainant and witnesses.
86. Warrant of arrest.
87. Proceedings, on complaint being controverted.
88. Person complained of, when to be discharged.
89. Security to keep the peace, when required.
90. Effect of giving or refusing to give security.
91. Person committed for not giving security, how discharged.
92. Undertaking, to be transmitted to sessions.
93. Security, when required, for assault, etc., in presence of a court or magistrate.
94. Appearance of party bound, upon his undertaking.
95. Person bound, may be discharged, if complainant does not appear.
96. Proceedings in sessions, on appearance of both parties.
97. Undertaking, when broken.
98. Undertaking, when and how to be prosecuted.
99. Security for the peace not required, except according to this chapter.

§ 84. **Information of threatened crime.**—An information may be laid before any magistrate that a person has threatened to commit a crime against the person or property of another.

3 R. S., 996, § 1; Laws 1866, ch. 95.

(a) **Must be on information.**—To justify the issuing of a warrant to require a person to find sureties of the peace there must be a formal complaint in writing, upon oath, in addition to the examination required by statute. (*Bradstreet v. Furguson*, 17 Wend., 181; 23 id., 638.)

§ 85. **Examination of complainant and witnesses.**—When the information is laid before a magistrate, he must examine on oath the complainant and any witnesses he may produce, and must reduce their examination to writing, and cause them to be subscribed by the parties making them.

3 R. S., 996, § 2.

(a) **When issued.**—To justify the issuing of a warrant the examination must declare the necessity of it. (*Bradstreet v. Furguson*, 17 Wend., 181; 23 id., 638.)

§ 86. **Warrant of arrest.**—If it appear from such examinations that there is just reason to fear the commission of the crime threatened, by the person complained of, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, marshal or policeman of the city or town, reciting the

substance of the information, and commanding the officer forthwith to arrest the person complained of, and bring him before the magistrate.

Id., § 3.

(a) **Abusive language.**—When a person uses abusive or reproachful language to the court it is sufficient cause for issuing warrant. (*Richmond v. Dayton*, 10 Johns., 393.)

(b) **Personal disclosures.**—So, also, where a prosecutor, in his own testimony, discloses his own infamy. (*Carpenter's case*, 1 C. H. Rec., 164.)

(c) **Keeper of house of ill-fame.**—Also where a person rents property for the purposes of prostitution. (*People v. Parkes*, 15 How., 551.)

There must, however, be a formal complaint to justify the issuing of a warrant. (*Bradstreet v. Ferguson*, 17 Wend., 181; 23 Wend., 638.)

See, also, cases cited under section 84, *ante*.

§ 87. Proceedings, on complaint being controverted.—When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

New.

In a summary proceeding to require a man to give sureties for his good behavior on the ground that he has abandoned his family, evidence is admissible that the complainant is not in fact his wife. (*Duffy v. People*, 6 Hill, 75.)

The question to be tried is, has the complainant just cause to entertain the fears expressed in his complaint. (26 Ind., 141; 21 id., 225; 35 id., 379; 48 id., 146.)

§ 88. Person complained of, when to be discharged.—If it appear that there is no just reason to fear the commission of the crime alleged to have been threatened, the person complained of must be discharged.

New.

§ 89. Security to keep the peace; when required.—If, however, there be just reason to fear the commission of the crime, the person complained of may be required to enter into an undertaking, in such sum, not exceeding one thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to abide the order of the next court of sessions of the county, and in the meantime to keep the peace towards the people of this state, and particularly towards the complainant.

3 R. S., 997, § 4.

Where a person uses abusive and reproachful language to a justice relative to his judicial conduct, the latter may issue his warrant and require the offender to find sureties for his good behavior. (*Richmond v. Dayton*, 10 Johns., 393.)

(a) **What cases will be held to sureties.**—A prosecutor who, in his own testimony, discloses his own infamy will be recognized for his good behavior. (*Carpenter's case*, 1 C. H. Rec., 164.)

(b) **Landlord in certain cases.**—A landlord who rents a house for purposes of prostitution may be held to bail under the statute. (*People v. Parkes*, 15 How., 551.)

(c) **Neglect of family.**—A person who neglects to support his wife may be held under the statute. (*People v. Mitchell*, 2 S. C., 172.)

(d) **Though case is weak.**—Though the evidence comes short of making out a clear case of crime, the court may be justified in requiring sureties. (1 Bish. Cr. L., § 945; *Ritchey v. Davis*, 11 Iowa, 124; *Steele v. State*, 4 Ind., 561; *Com. v. Ward*, 4 Mass., 497; *Com. v. Morey*, 8 id., 78; *Conklin v. State*, 8 Ind., 458; *Long v. State*, 10 id., 353; *Collins v. State*, 11 id., 812.)

(e) **Case of not guilty.**—The court may also, on the coming in of a verdict of not guilty, order the prisoner to give sureties. (*Bamber v. Com.*, 19 Barr., 339; *Respublica v. Donegan*, 2 Yeates, 437; *People v. Berner*, 13 Johns., 383; *Doyle's case*, 19 Abb. Pr., 269.)

(f) **Drunkenness.**—Drunkenness with disorderly conduct not necessarily a breach of the peace (*Rankin v. Com.*, 9 Bush, 553); but libel is such a breach. (*Com. v. Braynard*, 6 Pick., 113.)

§ 90. **Effect of giving or refusing to give security.**—If the undertaking required by the last section be given, the party complained of must be discharged. If it is not given, the magistrate must commit him to prison, specifying in the warrant the cause of commitment, the amount of security required, and the omission to give the same.

8 id., § 5.

(a) **What mittimus must state.**—It is sufficient in the *mittimus* to state that the party is convicted for refusing to give sureties. (*Bradstreet v. Ferguson*, 17 Wend., 181; 23 id., 638.)

(b) **Need not name the crime.**—It is not necessary to state in the *mittimus* the crime for which prisoner stands committed. (*Id.*)

A disorderly person may be committed until he find sureties to keep the peace. (*Doyle's case*, 19 Abb., 269.)

(c) **Must commit on refusal.**—When a justice of the peace, after an examination, has adjudicated that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so, it is his duty to issue his warrant of commitment. (*Gano v. Hall*, 5 Park., 651; 42 N. Y., 67.)

Form of warrant on a refusal to give sureties. (*Id.*)

§ 91. **Person committed for not giving security; how discharged.**—If the person complained of be committed for not giving security, he may be discharged by any two justices of

the peace of the county, or police or special justices of the city, upon giving the security.

3 R. S., 997, § 6.

§ 92. **Undertaking, to be transmitted to sessions.** — An undertaking given as provided in section eighty-nine, must be transmitted by the magistrate to the next court of sessions of the county.

Id., § 7.

§ 93. **Security, when required, for assault, etc., in presence of a court or magistrate.** — A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or to commit a crime against his person or property, or who contends with another in angry words, may be thereupon ordered by the court or magistrate to give security as provided in section eighty-nine, or if he refuses to do so, may be committed as provided in section ninety.

Id., § 8.

(a) **Abusive language.** — Where a person uses abusive or reproachful language to a justice relative to his judicial conduct, the latter may issue his warrant. (*Richmond v. Dayton*, 10 Johns., 398.)

§ 94. **Appearance of party bound, upon his undertaking.** — A person who has entered into an undertaking to keep the peace, must appear on the first day of the next term of the court of sessions of the county. If he do not, the court may forfeit his undertaking, and order it to be prosecuted, unless his default be excused.

Id., § 9.

§ 95. **Person bound, may be discharged if complainant does not appear.** — If the complainant do not appear, the person complained of may be discharged, unless good cause to the contrary be shown.

Id., § 10.

§ 96. **Proceedings in sessions, on appearance of both parties.** — If both parties appear, the court may hear their proofs and allegations, and may either discharge the undertaking, or require a new one, for a time not exceeding one year.

Id., § 10.

§ 97. **Undertaking, when broken.** — An undertaking to keep the peace is broken, on the failure of the person complained of to appear at the court of sessions, as provided in section ninety-four, or upon his being convicted of any crimes involving a breach of the peace.

Id., § 11.

§ 98. **Undertaking, when and how to be prosecuted.** — Upon the district attorney producing evidence of such conviction to the court of sessions to which the undertaking is returned, that court must order the undertaking to be prosecuted; and the district attorney must thereupon commence an action upon it in the name of the people of this state.

Id., § 12.

§ 90. **Security for the peace not required except according to this chapter.** — Security to keep the peace or be of good behavior, cannot be required, except as prescribed in this chapter.

Id., § 14.

Justice cannot take sureties singly. — A justice before whom one has been convicted as a disorderly person has no power, singly, to take a recognizance for good behavior. (*People v. Brown*, 28 Wend., 47.)

Neither in summary convictions. — Also, after a summary conviction as a disorderly person recognizance for good behavior cannot be taken. (*People v. Duffy*, 5 Barb., 205.)

CHAPTER III.

POLICE IN CITIES AND VILLAGES, AND THEIR ATTENDANCE AT EXPOSED PLACES.

SECTION 100. Organization and regulation of the police.

101. Force to preserve the peace, at public meetings, when and how ordered.

§ 100. **Organization and regulation of the police.** — The organization and regulation of the police in the cities and villages of this state are governed by special statutes.

New.

§ 101. **Force to preserve the peace, at public meetings, when and how ordered.** — The mayor or other officer having the direction of the police in a city or village, must order a force,

sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is to be apprehended.

New.

CHAPTER IV.

PREVENTION AND SUPPRESSION OF RIOTS.

SECTION 102. Powers of sheriff or other officer, in overcoming resistance to process.

103. His duty to certify to court the names of resisters and their abettors.
104. Duty of a person commanded to aid the officer.
105. When governor to order out a military force, to aid in executing process.
106. Magistrates and officers to command rioters to disperse.
107. To arrest rioters, if they do not disperse.
108. Consequences of refusal to aid the magistrates or officers.
109. Consequences of neglect or refusal of a magistrate or officer to act.
110. Proceedings, if rioters do not disperse.
111. Officers who may order out the military.
112. Commanding officer and troops to obey the order.
113. Armed force to obey orders.
114. Conduct of the troops.
115. Governor may, in certain cases, proclaim a county in a state of insurrection.
116. May call out the militia.
117. May revoke the proclamation.

§ 102. Powers of sheriff or other officer in overcoming resistance to process.— When a sheriff or other public officer, authorized to execute process, has reason to apprehend that resistance is about to be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.

3 R. S., 726, § 108; 1 Laws 1870, ch. 80, §§ 242-247; Laws 1855, ch. 428; Code Crim. Proc., § 457.

(a) **Sheriff must arrest when process is opposed.**— The sheriff being *ex officio* a conservator of the public peace, it is his duty to arrest all persons, with their abettors, who oppose the execution of legal process. (*Coyle v. Hurin*, 10 Johns., 85.)

(b) **May command bystanders.** — He has also power under the statute, to command a bystander to assist in overcoming a riotous assemblage. (*Id.*)

(c) **Bystanders must assist even if sheriff absent.** — And those so ordered may arrest the offenders even during the temporary absence of the sheriff. (*Id.*)

(d) **Bystanders liable for escape of prisoner.** — And should those thus commanded, suffer an offender knowingly to escape, they would be liable to punishment. (*Id.*)

(e) **Coroner may call in aid.** — Under the Code of Procedure, §§ 185, 419, the coroner may call to his aid the power of the county in a proper case, in executing an order of arrest in an action in which a sheriff is a party. (*Slater v. Wood*, 9 Bosw., 16.)

(f) **Persons summoned to aid must obey.** — The mere fact that the officer at the time of summoning the power of the county, had not proper cause for so doing, does not relieve the persons summoned, from the duty of obeying. (*Slater v. Wood*, 9 Bosw., 16.)

What are sufficient grounds for summoning assistance. (*Id.*, 46.)

(g) **One so aiding is a trespasser unless officer had authority.** — However, a person acting in aid of an officer, and by his commandment in overcoming resistance to the execution of a process is a trespasser, if the officer is not justified by the process. (*Elder v. Morrison*, 10 Wend., 137; *Oystead v. Shed*, 12 Mass., 511.)

(h) **Bystander obeys at his peril.** — The bystander obeys at his peril; if the officer has authority to do the act for the doing of which aid is required, the bystander is bound to obey and is justified; and if he refuses or neglects, is guilty of a misdemeanor. (*Elder v. Morrison*, 10 Wend., 137; *Leonard v. Stacey*, 6 Mod., 140.)

§ 103. **His duty to certify to court the names of resisters and their abettors.** — The officer must certify to the court from which the process issued the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for contempt.

8 R. S., 726, § 104; 1 R. S., 423, § 11.

§ 104. **Duty of a person commanded to aid the officer.** — Every person commanded by a public officer to assist him in the execution of process, as provided in section one hundred and two, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

Id., § 105; Code Cr. Proc., § 456.

The bystander, however, obeys at his peril. If the officer has authority to do the act for the doing of which aid is required, the bystander is bound to obey and is justified; and if he refuses or neglects, he is guilty of a misdemeanor. (*Elder v. Morrison*, 10 Wend., 137; *Coyle v. Hurin*, 10 Johns., 85; *Slater v. Wood*, 9 Bosw., 16.)

§ 105. **When governor to order out a military force to aid in executing process.** — If it appear to the governor that the power of the county is not sufficient to enable the sheriff to execute process delivered to him, he must, on the application of the sheriff, order such a military force from any other county or counties as is necessary.

3 R. S., 726, § 106.

§ 106. **Magistrates and officers to command rioters to disperse.** — When persons, to the number of five or more, armed with dangerous weapons, or to the number of ten or more, whether armed or not, are unlawfully or riotously assembled in a city, village or town, the sheriff of the county and his under sheriff and deputies, the mayor and aldermen of the city, or the supervisor of the town, or president or chief executive officer of the village, and the justices of the peace or the police justices of the city, village or town, or such of them as can forthwith be collected, must go among the persons assembled and command them, in the name of the people of the state, immediately to disperse.

New. See Laws 1845, ch. 69.

§ 107. **To arrest rioters, if they do not disperse.** — If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to law; and for that purpose, may command the aid of all persons present or within the county.

Id.

To convict of a riot it must be shown that defendant took an active part; mere presence not enough. (*Scott's case*, 2 C. H. Rec., 25; *Rodman's case*, 2 id., 88.)

It requires, however, no previous design or preconcert. (*People v. Ferris*, 4 Hall L. J., 209.)

If a crowd of three or more persons make an attack upon another with a preconcerted intent to commit an assault upon him, they are guilty of riot. (*People v. White*, 55 Barb., 606; *Rodman's case*, 2 C. H. Rec., 88.)

§ 108. **Consequences of refusal to aid the magistrates or officers.** — If a person so commanded to aid the magistrates or officers, neglects to do so, he is deemed one of the rioters, and is punishable accordingly.

Id.

§ 109. **Consequences of neglect or refusal of a magistrate or officer to act.**— If a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in section one hundred and six, neglects to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

Id.

§ 110. **Proceedings, if rioters do not disperse.**— If the persons assembled, and commanded to disperse, do not immediately disperse, any two of the magistrates or officers mentioned in section one hundred and six, may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary, to disperse the assembly and arrest the offenders.

Id.

§ 111. **Officers who may order out the military.**— When there is an unlawful or riotous assembly, with intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state, and the fact is made to appear to the governor, or to a judge of the supreme court, or to a county judge, or to the sheriff of the county, or to the mayor, recorder or city judge of a city, either of those officers may issue an order directed to the commanding officer of a division, brigade, regiment, battalion or company, to order his command, or any part of it (describing the kind and number of troops), to appear at a specified time and place to aid the civil authorities in suppressing violence and enforcing the law.

Id.

§ 112. **Commanding officer and troops to obey the order.**— The commanding officer, to whom the order is given, must forthwith obey it; and the troops required must appear at the time and place appointed, armed and equipped with ammunition as for inspection, and render such aid.

Id.

§ 113. **Armed force to obey orders.**— When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, it must obey the orders in relation thereto, of

either of the officers mentioned in section one hundred and eleven.

Id.

§ 114. **Conduct of the troops.** — Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives may be endangered.

Id.

§ 215. **Governor may, in certain cases, proclaim a county in a state of insurrection.** — When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county, by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation to be published in the state paper, and in such papers in the county as he may direct, declare the county to be in a state of insurrection.

3 R. S., 726, 107; Laws 1845, ch. 69, § 19.

§ 116. After the proclamation mentioned in the last section, the governor may order into the service of the state such number and description of volunteer or uniform companies, or other militia of the state, as he deems necessary, to serve for such term, and under the command of such officer or officers as he may direct.

Id.

§ 117. **May revoke the proclamation.** — The governor, when he thinks proper, may revoke the proclamation authorized by section one hundred and fifteen, or declare that it shall cease, at the time and in the manner directed by him.

Id.

PART III.

OF JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS, BY IMPEACHMENT OR OTHERWISE.

TITLE I. OF IMPEACHMENTS.

II. OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICE OF JUSTICES' COURTS AND THEIR CLERKS.

TITLE I.

OF IMPEACHMENTS.

- SECTION 118.** Impeachment to be delivered to president of the senate.
 119. Copy of impeachment served on defendant.
 120. Service, how made.
 121. Proceedings, if defendant do not appear.
 122. Defendant may object to deficiency of, or deny impeachment.
 123. Form of objection or denial.
 124. Proceedings thereon.
 125. Two-thirds necessary to conviction.
 126. Judgment on conviction, how pronounced.
 127. Adoption of resolution.
 128. Nature of the judgment.
 129. Officer, when impeached, disqualified to act until acquitted.
 130. Presiding officer, when president of the senate is impeached.
 131. Impeachment, not a bar to indictment.

§ 118. Impeachment to be delivered to president of the senate. — When an officer of the state is impeached by the assembly, the articles of impeachment must be delivered to the president of the senate.

3 R. S., 183, § 10; Penal Code, § 723.

New York Const., art. VI, § 1; 1 R. L., 132, § 4.

(a) **An associate judge may deliver an opinion.** — A presiding judge is liable for preventing his associate from delivering his opinion. (Addison's Trial, 114, 151; 8 C., 4 Dall., 235; Porter's Trial, 61; see, also, Barnard's Trial.)

§ 119. Copy of impeachment served on defendant. — The president of the senate must thereupon cause a copy of the articles of impeachment, with a notice to appear and answer the same, at the time and place appointed for the meeting of the

court, to be served on the defendant, not less than twenty days before the day fixed for the meeting of the court.

New in form. (See *Id.*, §§ 11, 13.)

§ 120. **Service, how made.** — The service must be upon the defendant personally, or if he cannot, upon diligent inquiry, be found in the state, the court upon proof of that fact, may order publication to be made in such manner as it deems proper, of a notice requiring him to appear at a specified time and place, and answer the articles of impeachment.

New in form. (See *Id.*, § 11.)

§ 121. **Proceedings, if defendant do not appear.** — If the defendant do not appear, the court, upon proof of service or publication as provided in the last two sections, may of its own motion, or for cause shown, assign another day or place for hearing the impeachment; or may then, or at any other time which it may appoint, proceed in the absence of the defendant, to trial and judgment.

New.

§ 122. **Defendant may object to sufficiency of, or deny impeachment.** — When the defendant appears, he must answer the articles of impeachment; which he may do, either by objecting to their sufficiency, or that of any article therein, or by denying the truth of the same.

New. (3 R. S., 183, § 12.)

§ 123. **Form of objection or denial.** — If the defendant object to the sufficiency of the impeachment, the objection must be in writing, but need not be in any specific form; it being sufficient, if it present intelligibly the grounds of the objection. If he deny the truth of the impeachment, the denial may be oral, and without oath, and must be entered upon the minutes.

New.

§ 124. **Proceedings thereon.** — If an objection to the sufficiency of the impeachment be not sustained by a majority of the members of the court who heard the argument, the defendant must forthwith answer the articles of impeachment. If he plead guilty, or refuse to plead, the court must render judgment of conviction against him. If he deny the matters charged the court

must, at such time as it may appoint, proceed to try the impeachment, and may adjourn the trial from time to time until concluded.

3 R. S., 183, § 11.

(a) **Accused may have counsel.**—He may appear by counsel, as in civil actions. (New York Const., art. I, § 6; 3 R. S., 183, § 12; see, also, *Rathbun v. Sawyer*, 15 Wend., 451, and *Garling v. Van Allen*, 55 N. Y., 81.)

§ 125. Two-thirds necessary to conviction.—The defendant cannot be convicted on an impeachment, without the concurrence of two-thirds of the members present during the trial; and if such two-thirds do not concur in a conviction, the defendant must be declared acquitted.

New York Const., art. VI, § 1; 3 R. S., 184, §§ 16, 17.

§ 126. Judgment on conviction, how pronounced.—After conviction the court must immediately, or at such other time as it may appoint, pronounce judgment, in the form of a resolution, entered upon the minutes of the court. The vote upon the passage thereof must be taken by yeas and nays, and must also be entered upon the minutes.

New.

§ 127. Adoption of resolution.—On the adoption of the resolution by a majority of the members present, who voted on the question of acquittal or conviction, it becomes the judgment of the court.

New.

§ 128. Nature of the judgment.—Upon conviction, the judgment must be either:

1. That the defendant be removed from office; or
2. That he be removed from office and disqualified to hold and enjoy a particular office or class of offices, or any office of profit, trust or honor whatever under this state.

N. Y. Const., art VI, § 1; 3 R. S., 184, § 18.

(a) **Dueling law constitutional.**—The law of 1816, providing that any person convicted of dueling, etc., may be adjudged disqualified from holding any office of trust or emolument, civil or military, is constitutional, and a conviction under it is valid. (*Barker v. People*, 20 Johns., 457; 3 Cow., 686; 2 Wh. C. C., 19.)

§ 129. Officer, when impeached, disqualified to act until acquitted.—No officer shall exercise his office, after articles of

impeachment against him shall have been delivered to the senate, until he is acquitted.

N. Y. Const., art. VI, § 1; 3 R. S., 184, § 19.

§ 130. **Presiding officer, when president of the senate is impeached.**— If the president of the senate be impeached, notice of the impeachment must be immediately given to the senate by the assembly, that another president may be chosen.

3 R. S., 184, § 20.

§ 131. **Impeachment not a bar to indictment.**— If the offense for which the defendant is impeached be a crime, the prosecution thereof is not barred by the impeachment.

3 R. S., 184, § 21; N. Y. Const., art. VI, § 1.

TITLE II.

OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICES OF JUSTICES' COURTS, AND THEIR CLERKS.

§ 132. Justices of the peace, police justices, justices of justices' courts, and their clerks, are removable by the supreme court at a general term.

3 R. S., 184, § 18; 3 R. S., 223, § 96, ch. 280; Laws 1847, § 25; N. Y. Const., art. VI, § 18.

(a) **Police justice a creature of legislation.**— The legislature may abolish or abridge the term of the office of police justice. (*Coulter v. Murray*, 15 Abb. [N. S.], 129; *Wensler v. People*, 58 N. Y., 516; see, also, *People v. Keeler*, 17 id., 320; *People v. Shea*, 7 Hun, 309.)

PART IV.

OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED BY INDICTMENT.

TITLE I. OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

II. OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

III. OF THE INFORMATION, AND PROCEEDINGS THEREON TO THE COMMITMENT INCLUSIVE.

IV. OF THE PROCEEDINGS AFTER COMMITMENT, AND BEFORE INDICTMENT.

V. OF THE INDICTMENT.

VI. OF THE PROCEEDINGS ON THE INDICTMENT BEFORE TRIAL.

VII. OF THE TRIAL.

VIII. OF THE PROCEEDINGS AFTER TRIAL, AND BEFORE JUDGMENT.

IX. OF THE JUDGMENT AND EXECUTION.

X. GENERAL PROVISIONS RELATING TO PUNISHMENT OF CRIME.

XI. OF APPEALS.

XII. OF MISCELLANEOUS PROCEEDINGS.

TITLE I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 133. When a person leaves this state to elude its laws.

134. When a crime is committed partly in one county and partly in another.

135. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof.

136. Jurisdiction of crime on board of vessel.

137. Of crime committed in the state on board of any railway train, etc.

138. Indictment for libel.

139. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.

140. Conviction or acquittal in another county, a bar, where the jurisdiction is concurrent.

§ 133. When a person leaves this state to elude its laws.

A person who leaves this state, with intent to elude any law thereof against duelling or prize-fighting, or challenges thereto, or to do any act forbidden by such a law, or, who being a resident

of this state, does an act out of it, which would be punishable as a violation of such a law, may be indicted and tried in any county of this state.

3 R. S., 963, §§ 5, 8.

Crime committed in one State not recognized in another. — A crime committed in one State is not cognizable in another. The criminal must be demanded by the executive in the manner prescribed by the Constitution. (*People v. Wright*, Col. & Caines, 390; 2 Caines, 213.)

If one steal a horse in another State, and be apprehended in this State with the horse in his possession, our courts have no jurisdiction to try him, he must be treated as a fugitive from justice. (*People v. Gardner*, 2 Johns., 477; *People v. Schenck*, Id., 479; *McCullough's case*, 2 C. H. Rec., 45.)

Bigamy is not punishable in this State unless the second marriage took place within its territorial jurisdiction. (*People v. Mosher*, 2 Park., 195.)

An indictment for bigamy cannot be tried in a county in which the second marriage did not take place unless defendant was apprehended therein. (*Colins v. People*, 1 Hun, 610; 4 S. C., 77; see, also, *Houser v. People*, 46 Barb., 83.)

§ 134. When a crime is committed partly in one county and partly in another. — When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county.

Id., §§ 47, 48, 50.

(a) **Habeas corpus.** — A *habeas corpus* may issue to bring up a prisoner, in order to his removal for trial to the county where the offense was committed. (*People v. Mason*, 9 Wend., 505.)

(b) **County jurisdiction.** — If it appear that the offense was committed in another county, the defendant was acquitted for want of jurisdiction. (*Grinbold's case*, 1 C. H. Rec., 181.)

(c) **In cases of larceny, conviction may be had where goods found.** — A thief may be indicted for larceny in any county where the goods stolen were found in his possession. (*Haskins v. People*, 16 N. Y., 344; *Paine's case*, 1 C. H. Rec., 64; *Wells v. People*, 8 Park., 478; *Mack v. People*, 82 N. Y., 235.)

§ 135. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof. — When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

3 R. S., 1021, § 45.

For the purposes of criminal jurisdiction, an offense is committed on the boundary line between adjacent counties if perpetrated within five hundred yards thereof. (*People v. Davis*, 36 N. Y., 77; 45 Barb., 494.)

When an offense is committed within five hundred yards of a county line, the court of either county has jurisdiction of it. (*People v. Davis*, 56 N. Y., 95.)

§ 136. **Jurisdiction of crime on board a vessel.** — When a crime is committed in this state on board of a vessel navigating a river, lake or canal, or lying therein in the course of her voyage, or in respect to any portion of the cargo or lading of such boat or vessel, the jurisdiction is in any county through which, or any part of which, such river or canal passes, or in which such lake is situated or on which it borders, or in the county where such voyage terminates, or would terminate if completed.

3 R. S., 1031, § 44.

(a) **Vessel.**—An offense committed on board a vessel navigating a river must be tried in some county through which it passed, and not in its port of destination. (*People v. Hulse*, 3 Hill, 309.)

(b) **Steamboat.**—An offense committed on a steamboat close to the Long Island shore, in Suffolk county, upon a trip from the city of New York to Norwich, Conn., is not indictable in the county of New York. (*Manly v. People*, 7 N. Y., 295; *Haskins v. People*, 16 id., 344.)

(c) **On canal.**—In order to confer jurisdiction over an offense committed on board a boat upon a canal in respect to the cargo thereof, it must be averred in the indictment and proved that the crime was committed on board the boat or vessel, and on that trip or voyage she had passed through some part of the county where the indictment was found. (*Larkin v. People*, 61 Barb., 226.)

§ 137. **Of crime committed in the state on board of any railway train, etc.** — When a crime is committed in this state, in or on board of any railway engine, train or car, making a passage or trip on or over any railway in this state, or in respect to any portion of the lading or freightage of any such railway train or engine car, the jurisdiction is in any county through which, or any part of which, the railway train or car passes, or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates, or would terminate if completed.

Laws 1877, ch. 167.

Held, that under the statute providing that when any offense shall have been committed in respect to any portion of the freight of any railroad train, etc., an indictment may be found in any county through which such shall have passed; an indictment, trial and conviction may be had in Schenectady county, the train having passed through that place. The legislature had power to pass such an act. (*People v. Dowling*, 23 Alb. L. J., 353; 84 N. Y., 478; 12 Week. Dig., 201.)

§ 138. **Indictment for libel.** — When a crime of libel is committed by publication in any paper in this state, against a

person residing in the state, the jurisdiction is in either the county where the paper is published, or in the county where the party libeled resides. But the defendant may have the place of trial changed to the county where the libel is printed, on executing a bond to the complainant in the penal sum of not less than two hundred and fifty dollars nor more than one thousand dollars, conditioned, in case the defendant is convicted, for the payment of the complainant's reasonable and necessary traveling expenses in going to and from his place of residence and the place of trial, and his necessary expenses in attendance thereon, which bond must be signed by two sufficient sureties, to be approved by a judge of a court of record exercising criminal jurisdiction.

Whenever the crime of libel is committed against a person not a resident of this state, the defendant must be indicted and the trial thereof had in the county where the libel is printed and published. But if the paper does not, upon its face, purport to be printed or published in a particular county of this state, the defendant may be indicted and the trial thereof had in any county where the paper is circulated. In no case, however, can the defendant be indicted for the printing or publication of one libel in more than one county of this state.

3 R. S., 1025, §§ 80, 81, 82.

§ 139. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent. — When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state.

3 R. S., 789, § 5; Id., 963, § 7; Penal Code, § 679; U. S. Const., fifth amendment.

(a) **Second offense.** — The statute declaring a second offense of petit larceny to be punishable in a state's prison, is not applicable to a case in which the first conviction took place in another state. (*People v. Caesar*, 1 Park., 645.)

If a resident of another state obtain goods by false pretenses, within this state, through an innocent agent, our courts have jurisdiction of the offense and of the person, if the offender be arrested within the limits of this state. (*People v. Adams*, 3 Den., 190; 1 N. Y., 173.)

§ 140. Conviction or acquittal in another county, a bar, where the jurisdiction is concurrent. — When a crime is within the jurisdiction of two or more counties of this state, a

conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another.

New in form.

See cases cited under § 135, *ante*.

Where the verdict of guilty is set aside on the motion of the defendant, there is no bar to a new trial upon the count whereon he was convicted. (*People v. Dowling*, 84 N. Y., 478; 23 Alb. L. J., 353; 12 N. Y. W. D., 201.)

TITLE II.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

SECTION 141. Prosecution for murder may be commenced at any time.

142. Limitation of five years.

143. Defendant out of state.

144. Indictment deemed found, when presented in court and filed.

§ 141. **Prosecution for murder may be commenced at any time.**—There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

3 R. S., 1020, § 87; 1 R. L., 187, § 7; Amended Laws 1873, ch. 630.

(a) **No limitation to cases of murder.**—Our statute requires all indictments, except in murder cases, to be found within three years. (*See People v. Strong*, 1 Abb. [N. S.], 247.)

The crime of accessory before the fact to a murder is murder. (*People v. Mather*, 4 Wend., 229.)

Conviction of a party for an assault, etc., is no bar to prosecution for murder. (*Burns v. People*, 1 Park., 182.)

§ 142. **Limitation of five years.**—An indictment for a crime, other than murder, must be found within five years after its commission, except where a less time is prescribed by statute.

Id.

No limitation to cases of nuisance.—No lapse of time legalizes a nuisance. (*People v. Cunningham*, 1 Den., 524.) See Penal Code, § 285, with reference to prosecutions for seduction under promise of marriage.

See, also, *People v. Strong* (1 Abb. [N. S.], 247.)

§ 143. **Defendant out of state.**—If, when the crime is committed, the defendant be out of the state, the indictment may be found within the term herein limited after his coming within the state; and no time during which the defendant is not an inhabit-

ant of, or usually resident within, the state, is part of the limitation.

Id.

§ 144. Indictment deemed found when presented in court and filed.—An indictment is found, within the meaning of the last three sections, when it is duly presented by the grand jury in open court, and there received and filed.

New in form.

Must be found and filed with the clerk of the court in which they were found within the time specified. (*People v. Strong*, 1 Abb. [N. S.], 247.)

TITLE III.

OF THE INFORMATION AND PROCEEDINGS THEREON TO THE COMMITMENT, INCLUSIVE.

- CHAPTER I. The information.
- II. The warrant of arrest.
 - III. Arrest by an officer under a warrant.
 - IV. Arrest by an officer without a warrant.
 - V. Arrest by a private person.
 - VI. Retaking, after an escape or rescue.
 - VII. Examination of the case, and discharge of the defendant or holding him to answer.

CHAPTER I.

THE INFORMATION.

- SECTION 145. Information defined.
- 146. Magistrate defined.
 - 147. Who are magistrates.

§ 145. Information defined.—The information is the allegation made to a magistrate that a person has been guilty of some designated crime.

New.

It will be seen that the above definition differs materially from that attached to the same term under the old practice, where it is defined to be "an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office instead of by a grand jury on their oaths." (1 Bish. Crim. Pro., § 141; 2 Hawk. P. C. C., 26, § 4; *Wilkes v. Rex*, 4 Bro. P. C., 360; Bac. Abr. "Information;" *Com. v. Messenger*, 4 Mass., 402.)

§ 146. **Magistrate defined.** — A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a crime.

New.

§ 147. **Who are magistrates.** — The following persons are magistrates :

1. The judges of the supreme court ;
2. The judges of any city court ;
3. The county judges and special county judges ;
4. The city judge of the city of New York and the judge of the court of general sessions in the city and county of New York ;
5. The justices of the peace ;
6. The police and other special justices, appointed or elected in a city, village or town ;
7. The mayors and recorders of cities.

3 R. S., 998, § 1.

CHAPTER II.

THE WARRANT OF ARREST.

SECTION 148. Examination of the prosecutor and his witnesses, upon the information.

149. Depositions, what to contain.
150. In what case warrant of arrest may be issued.
151. Form of the warrant.
152. Name or description of the defendant, in the warrant and statement of the offense.
153. Warrant to be directed to and executed by a peace officer.
154. Who are peace officers.
155. Warrant issued by certain judges.
156. Warrant issued by other magistrates.
157. Indorsement on the warrant, for service in another county, how and upon what proof to be made.
158. Defendant, arrested for felony.
159. Defendant, arrested for a misdemeanor.
160. Proceedings on taking bail from the defendant, in such case.
161. Proceedings, where he is admitted to bail in such case, but bail is not given.
162. Prisoner carried from county to city.
163. Power and privilege of officer.
164. When magistrate issuing the warrant is unable to act.
165. Defendant in all cases to be taken before a magistrate, without delay.
166. Defendant, before another magistrate than the one who issued
• the warrant.

§ 148. Examination of the prosecutor and his witnesses, upon the information.—When an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant and prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

8 R. S., 998, § 2.

(a) **Need not reduce to writing.**—The law does not require the information to be reduced to writing previously to issuing the warrant. (*Payne v. Barnes*, 5 Barb., 465; *Ex parte Boswell*, 34 How., 347.)

The omission of the magistrate to reduce the complaint to writing does not make the prosecutor a trespasser. (*Sleight v. Ogle*, 4 E. D. Smith, 445.)

(b) **Complaint not on oath.**—The complaint need not be on oath, but the examination of complainant must be on oath. (*Ex parte Boswell*, 34 How., 347.)

(c) **Must have accused before him.**—A magistrate has no authority to order a person accused of a criminal offense to be committed until a subsequent day for examination without having first the accused brought before him. (*Pratt v. Hill*, 16 Barb., 808.)

(d) **May issue subpoenas.**—Where the complaint is made on information the magistrate has power to issue subpoenas for witnesses. (*People v. Hicks*, 15 Barb., 153.)

The same strictness is not required in an information as on an indictment. (*People v. Robertson*, 3 Wh. C. C., 180.)

(e) **Not evidence.**—The original information and depositions taken before the warrant was issued, however formerly drawn up, are not in themselves evidence against the accused at the trial. (*People v. Restell*, 3 Hill, 290.)

(f) **What sufficient complaint.**—A written complaint made before a magistrate alleging that certain goods had been stolen, and that the complainant has probable cause to suspect and does suspect that A. stole them, is insufficient to justify the issuing a warrant for the arrest of the accused. (*Blodgett v. Race*, 18 Hun, 132.)

§ 149. Depositions, what to contain.—The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant.

New.

(a) **What must be set forth.** (*People v. Pratt*, 22 Hun, 300.)

(b) **Must be strict.**—The same strictness is not required in an information as in an indictment. (*People v. Robertson*, 3 Wh. C. C., 180.)

(c) **Information not evidence.**—The original information and depositions taken before the warrant was issued are not in themselves evidence against the accused on trial. (*People v. Restell*, 3 Hill, 290.)

§ 150. In what case warrant of arrest may be issued.—

If the magistrate be satisfied therefrom, that the crime complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

3 R. S., 998, § 3.

(a) **Must be reasonably certain.** — It is enough when a magistrate is reasonably certain that a crime has been committed. (*Pratt v. Bogardus*, 49 Barb., 89; *Abbott v. Booth*, 50 id., 551.)

(b) **Need not set forth circumstances.** — Not necessary that, in a criminal warrant, to set out the circumstances of the offense. (*Atchinson v. Spencer*, 9 Wend., 62.)

(c) **Just ground of suspicion enough.** — Just grounds of suspicion sufficient. (*Samuel v. Payne*, Doug., 359; *Halley v. Mix*, 3 Wend., 350; *Cowles v. Dunham*, 2 C. & P., 565.)

(d) **Must be reasonably certain.** — A justice of the peace, before he is authorized to issue a warrant for the arrest of a person, must be satisfied, by examination upon oath of the complainant, that a crime has been committed. (*Wilkinson v. Robinson*, 6 How., 110.)

A justice has jurisdiction to issue a warrant of arrest though he abuse it grossly. (*Campbell v. Ewalt*, 7 How., 399; *Stewart v. Hawley*, 21 Wend., 553.)

§ 151. (Amended 1882.) Form of the warrant. — A warrant of arrest is an order in writing in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form :

“COUNTY OF ALBANY [or as the case may be].

“In the name of the people of the state of New York. To any peace officer in this state [or in the county of Albany, or as the case may be, as provided in sections one hundred and fifty-five and one hundred and fifty-six].

“Information upon oath having been this day laid before me, that the crime of [designating it,] has been committed, and accusing C. D. thereof.

“You are therefore commanded, forthwith to arrest the above-named C. D., and bring him before me, at — [naming the place,] or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

“Dated at the city of Albany, [or as the case may be,] this
day of , eighteen hundred

“E. F.,

Justice of the peace,

[Or as the case may be.]”

New.

§ 152. Name or description of the defendant, in the warrant and statement of the offense. — The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an offense in respect to which the magistrate has authority to issue the warrant, and the time of issuing it, and the city, town or village where it is issued, and be signed by the magistrate with his name of office.

New in form.

Not necessary in a criminal warrant to set out the circumstances of the offense. (*Atchenson v. Spencer*, 9 Wend., 62.)

(a) **Amount of certainty required in warrant.** — It is sufficient if a criminal warrant indicate with reasonable certainty the offense sought to be charged. (*Pratt v. Bogardus*, 49 Barb., 87.)

(b) **As to time and place.** — Requisites of a criminal warrant as to time, place and the description of the offense. (2 Abb., 468.)

(c) **As to value in larceny.** — Warrant for larceny good though it omit to state the value of the property stolen. (*Payne v. Barnes*, 5 Barb., 465.)

(d) **Name of party.** — A warrant reciting a complaint against John R. Miller for a felony, and commanding the officer to arrest the said William Miller, is no justification for the arrest of John R. Miller, though the person intended. (*Miller v. Foley*, 28 Barb. 630.)

(e) **Misnomer.** — A misnomer of a person in a process on which an arrest is made, subjects the actors to an action for false imprisonment. (*Seall v. Ely and ano.*, 4 Wend., 552.)

In a criminal proceeding a warrant at common law must be under seal. (*Beekman v. Traver*, 20 Wend., 77; *People v. Holcomb*, 3 Park., 656; *Smith v. Randall*, 3 Hill 495.)

Warrants of arrest need not contain the facts on which the charge is predicated, but are sufficient if the nature of the offense be clearly specified. (*People v. McLeod*, 1 Hill, 377.)

(f) **What omissions in warrant allowed.** — An omission in a warrant of arrest which is merely clerical "and which does not mislead anyone," will not render such warrant invalid. (*Payne v. Barnes*, 5 Barb., 465.)

§ 153. Warrant to be directed to and executed by a peace officer. — The warrant must be directed to, and executed by, a peace officer.

New.

(a) **Must be properly directed.** — Warrant not directed to the proper officer is void. (*Russell v. Hubbard*, 6 Barb., 654.)

(b) **How directed.** — A warrant legally issued can only be directed to an officer of the county in which the justice of the peace who issued it was a magistrate. (*People v. Shaver*, 4 Park., 45.)

(c) **Warrant must be served by person to whom directed.**—Where a warrant is issued, directed to the sheriff or any constable of the county, the justice cannot, by indorsement thereon, authorize a private person to make the arrest; the warrant itself must be directed to the person by whom the arrest is made, or it is no protection. (*Abbott v. Booth*, 51 Barb., 546.)

§ 154. (Amended 1882.) **Who are peace officers.**—A peace officer is a sheriff of a county, or his under-sheriff or deputy, or a constable, marshal, police constable or policeman of a city, town or village.

New.

§ 155. (Amended 1882.) **Warrant issued by certain judges.**—If the warrant be issued by a judge of the supreme court, or of the superior court, or court of common pleas, recorder, city judge or judge of a court of general sessions in the city and county of New York, or by a county judge, or by a judge of the city court, it may be directed generally to any peace officer in the state, and may be executed by any of those officers to whom it may be delivered.

3 R. S., 999, § 4.

See opinion of NELSON, Ch. J., *Moak v. De Forest*, 5 Hill, 607.

§ 156. (Amended 1882.) **Warrant by other magistrates.**—If it be issued by any other magistrate, it may be directed generally to any peace officer in the county in which it is issued, and may be executed in that county; or if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of such other county indorsed upon the warrant, signed by him with his name of office, and dated at the city, town or village where it is made, to the following effect: "This warrant may be executed in the county of Monroe," [or as the case may be.]

Id., § 5.

(a) **Justice cannot arrest out of his jurisdiction.**—A justice of the peace, for a misdemeanor committed within his view, cannot pursue the offender and arrest him outside the justice's jurisdiction. (*Butolph v. Blunt*, 5 Lans. 84; 4 How. Pr., 481.)

(b) **When released on bail cannot be again arrested on old warrant.**—Where a person arrested by virtue of a criminal warrant, indorsed pursuant to statute, is discharged from arrest by a justice of the peace of the county where he is arrested, on giving a recognizance, the warrant has spent itself, and the officer has no right to arrest the prisoner again without new process. (*Doyle v. Russell*, 30 Barb., 300.)

(c) **Want of jurisdiction.** — A justice of the peace has no power to issue process of arrest for a crime committed in another county, though the offender be in the county where the justice resides. (*People v. Cassels*, 5 Hill, 167; *Id.*, 607.)

(d) **Must be taken to county where crime was committed for bail.** — A person arrested by virtue of a warrant, indorsed pursuant to statute, for an offense punishable by imprisonment in the State prison, cannot be let to bail in the county where the arrest is made, but must be taken to the county in which the warrant was issued. (*Clark v. Cleveland*, 6 Hill, 344; see *People v. Clews*, 77 N. Y., 39; also, *Garslone's case*, 10 Abb., 182; *People ex rel. Chapman*, 30 How., 202.)

(e) **Otherwise justice liable for false imprisonment.** — Where an offender arrested under a warrant, indorsed in pursuance of the act "for the better apprehending of felons," etc., was taken to the county where the magistrate resided who issued the warrant, he not being a justice of the county where the offense was committed, it was held that the action for false imprisonment was properly brought, he not having complied with the requirements of the statute. (*Green v. Rumsey*, 2 Wend., 611.)

§ 157. Indorsement on the warrant, for service in another county, how and upon what proof to be made. — The indorsement mentioned in the last section cannot, however, be made, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

3 R. S., 999, §§ 5, 7.

See cases cited under last section.

§ 158. Defendant, arrested for felony. — If the crime charged in the warrant be a felony the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided in section 164.

Id., § 11.

If the offense charged in the warrant be punishable with death or imprisonment in a state's prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued before some magistrate thereof, etc. (*People v. Chapman*, 30 How., 202; *People v. Clews*, 77 N. Y., 39; and cases cited under section 156, *ante.*)

§ 159. Defendant, arrested for a misdemeanor. — If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being

required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly.

Id., §§ 7, 8.

If the offense charged in the warrant be not punishable by death or by imprisonment in a state's prison, the prisoner may let to bail by a magistrate of the county in which he is arrested. (*People v. Chapman*, 80 How., 202; *People v. Clews*, 77 N. Y., 89.)

§ 160. Proceedings on taking bail from the defendant in such case. — On taking bail the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and, without delay, deliver the warrant and undertaking to the magistrate before whom the defendant is required to appear.

Id., § 9.

Id., § 12.

§ 161. Proceedings, where he is admitted to bail in such case, but bail is not given. — If, on the admission of the defendant to bail, as provided in section one hundred and fifty-nine, bail be not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided in section one hundred and sixty-four.

Id., § 10.

§ 162. Prisoner carried from county to city. — An officer who has arrested a defendant on a criminal charge, in any county, may carry such prisoner through such parts of any county or counties as shall be in the ordinary route of travel from the place where the prisoner shall have been arrested, to the place where he is to be conveyed and delivered under the process by which the arrest shall have been made; and such conveyance shall not be deemed an escape.

3 R. S., 712, §§ 6, 7.

A prisoner in custody and passing through a county not liable to arrest on civil process. (*Love v. Humphrey*, 9 Wend., 204.)

§ 163. Power and privilege of officer. — While passing through such other county or counties the officers having the

prisoner in their charge shall not be liable to arrest on civil process; and they shall have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escapes, as if they were in their own county; and a refusal or neglect to render such aid shall be an offense, in the same manner as if they were officers of the county where such aid shall be required.

Id.

§ 164. When magistrate issuing the warrant is unable to act.—When, by the preceding sections of this chapter, the defendant is required to be taken before the magistrate who issued the warrant, he may, if that magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the same county. The officer must, at the same time, deliver to the magistrate the warrant with his return indorsed and subscribed by him.

3 R. S., 999, § 12.

Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant, or if he be absent or his office be vacant, before the nearest magistrate in the same county. (*People v. Chapman*, 80 How., 202; *People v. Clews*, 77 N. Y., 89.)

§ 165. (Amended 1882.) Defendant in all cases to be taken before a magistrate without delay.—The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. In each of the cities of New York or Brooklyn a police justice to be designated from time to time by the mayors of those cities respectively, must be in attendance at the police headquarters of the city from four o'clock in the afternoon of each day to ten o'clock the next morning, to take bail in proper cases, if bail be offered.

New.

(a) **Magistrate must have prisoner before him.**—A magistrate cannot commit a prisoner under arrest for a future hearing until he has been brought before him. (*Pratt v. Hill*, 16 Barb., 308.)

(b) **Illegal committal.**—A justice of the peace issued a warrant on Saturday on a criminal complaint, and on it indorsed a direction to the constable to commit the parties until next Monday for examination, and the constable committed them and held them accordingly. *Held*, that both officers were trespassers. The party arrested must be forthwith taken before a magistrate. (*Pratt v. Hill*, 16 Barb., 308; *Hawley v. Butler*, 48 Barb., 101.)

(c) **How long prisoner may be detained.**—The officer may detain the defendant a reasonable time to find a magistrate. (*Arnold v. Steeves*, 10 Wend., 514, 515.)

May be held on a justice's warrant not exceeding twelve hours. (*Id.*)

§ 166. **Defendant, before another magistrate than the one who issued the warrant.**—If the defendant be taken before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

New.

CHAPTER III.

ARREST BY AN OFFICER, UNDER A WARRANT.

SECTION 167. Arrest defined.

168. By whom an arrest may be made.

169. Every person bound to aid an officer in an arrest.

170. When the arrest may be made.

171. How an arrest is made.

172. No further restraint allowed than is necessary.

173. Officer must state his authority, and show warrant, if required.

174. If defendant flee or resist, officer may use all necessary means to effect arrest.

175, 176. When an officer may break open a door or window.

§ 167. **Arrest defined.** Arrest is the taking of a person into custody that he may be held to answer for a crime.

New. (See 1 Bish. Crim. Proc., § 156; see, also, Law of Arrests, London, 1742, p. 1.)

§ 168. **By whom an arrest may be made.**—An arrest may be:

1. By a peace officer, under a warrant;
2. By a peace officer, without a warrant; or
3. By a private person.

New.

§ 169. **Every person bound to aid an officer in an arrest.**—Every person must aid an officer in the execution of a

warrant, if the officer require his aid and be present and acting in its execution.

3 R. S., 726, § 105; Id., 1045, § 24; Code of Criminal Procedure, § 456.

(a) **Officer may command bystander to assist.** — The officer in making an arrest or in securing his prisoner afterwards, may, if he deems it necessary, call upon a bystander for help, or even command the aid of all persons in his precinct, whether he is acting under a warrant or not. (1 Bish. Crim. Proc., § 185; *The State v. Shaw*, 3 Ire., 20; *Mitchell v. State*, 7 Eng., 50; *Burdett v. Colman*, 14 East, 163.)

A sheriff being resisted in making an arrest, may command bystanders to help and they are bound to do so, even if the sheriff is absent for a brief space. (*Coyles v. Hurst*, 10 Johns., 85; *Elder v. Morrison*, 10 Wend., 187.)

§ 170. **When the arrest may be made.** — If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it be a misdemeanor, the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant.

See 2 R. S., 928, § 88.

(a) **Arrest, how and when made.** — The arrest may be made as well in the night time as in the day. (1 Chitty Crim. Law, 16; *State v. Smith*, 1 N. H., 346; *State v. Shaw*, 1 Root, 134; *Kelsey v. Right*, 1 id., 88; *State v. Brennan's Liquors*, 25 Conn., 278; *Bell v. Clapp*, 10 Johns., 268.) And at what ever hour the officer deems expedient. (*Wright v. Keith*, 24 Me., 158.)

Under common law, arrests equally in civil and criminal cases could be made on Sunday. (*Mackalley's case*, 9 Co., 65a, 66b.)

§ 171. **How an arrest is made.** — An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

New.

(a) **Actual touch unnecessary.** — A manual touching of the body or actual arrest, is not necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to arrest. (*Bissell v. Gold*, 1 Wend., 210.)

(b) **Must be restraint.** — Where spoken words will not constitute an arrest, there must be something by way of physical restraint, though it is enough if the party arresting touch the other, even with the end of the finger. (*Genner v. Sparks*, 6 Mod., 173; 1 Salk. 79; *Whitehead v. Keyes*, 3 Allen, 495, 501.)

§ 172. **No further restraint allowed than is necessary.** — The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention.

New. (*State v. Mahon*, 3 Harring. [Del.], 568; *Gerous v. State*, 40 Tex., 97; *Rhodes v. King*, 52 Ala. 272.)

§ 173. **Officer must state his authority, and show warrant, if required.** — The defendant must be informed by the officer that he acts under the authority of the warrant, and he must also show the warrant, if required.

New.

(a) **Must show warrant.** — All private persons and all officers if not commonly known, and even these if they act without that precinct, must show their warrants, if demanded. (*U. S. v. Jaylor of Fayette*, 2 Abb. [U. S.], 265, 275; *Com. v. Fuld*, 18 Mass., 321; *State v. Curtis*, 1 Hayw., 471; *Arnold v. Steeves*, 10 Wend., 514; *Frost v. Thomas*, 24 id., 418.)

(b) **Contra.** — *Semble*, that a regular officer making an arrest in his proper district, is not bound to show his process, even though demanded. (*Bellows v. Shannon*, 2 Hill, 86.)

If an officer, in making a forcible arrest, conceals the fact that he is acting under process, without any lawful excuse for so doing, *quære*, whether he can afterwards use the process for the purpose of justifying arrest. (*Id.*: *Frost v. Thomas*, 24 Wend., 418; *Arnold v. Steeves*, 10 id., 518.)

§ 174. **If defendant flee or resist, officer may use all necessary means to effect arrest.** — If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

New.

(a) **May use all necessary force.** — If a felony has actually been committed, an officer, in arresting the offender or preventing his escape, will be justified in taking his life, providing there is an absolute necessity for so doing. It is otherwise in case of an arrest for misdemeanor. (*Conraddy v. People*, 5 Park., 287; *Rey v. Murphy*, 1 Cawf. & Dix C. C., 20; *Gardiner v. Thebodeau*, 14 La. An., 732.)

All force necessary may be employed by an officer alike in a felony and misdemeanor in making an arrest. (*Mesoner v. Comr.*, 26 Grat., 976; *Brooks v. Comr.*, 11 Smith [Pa.], 352; *Golden v. State*, 1 S. C., 292; *Burdett v. Coleman*, 14 East, 163, 190.)

§ 175. **When officer may break open a door or window.** — The officer may break open an outer or inner door or window of any building, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

New.

(a) **Officer without warrant not to break door.** — An officer without a warrant has no right to break open an outer door in order to make an arrest, though a dangerous wound has been inflicted. (*Randall's case*, 5 C. H. Rec., 141.)

(b) **Otherwise under proper warrant.** — *Held*, that the right to break outer door in making an arrest extends to every sort of indictable wrong when the arresting party is acting under a lawful warrant. (*Curtis' case*, *Foster*, 135; *Launock v. Brown*, 2 B. & Ald., 592; 2 Hawk. P. C., ch. 14, §§ 3-7.)

(c) **May break inner door.**—When the officer has once made a lawful entrance through the outer door into the house, in service of either civil or criminal process, he may proceed to break inner doors, if necessary. (*Ree v. Bird*, 2 Show., 87; *Smith v. Butler*, Comb., 328.)

(d) **Necessary demand.**—What constitutes a sufficient demand on part of officer for entrance. (*Launock v. Brown*, 2 B. & Ald., 592.)

§ 176. When officer may break open a door or window.—An officer may break open an outer or inner door or window of any building, for the purpose of liberating a person, who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.

New.

(a) **Breaking out.**—If the officer, having lawfully entered the house through an open outer door, is locked in by inmates, he may break out or be rescued by his associates breaking in. (1 Blah. Cr. Proc., § 202; *White v. Wiltshire*, Cro. Jac., 555; 1 Chitt. Crim. Law, 58; 2 Hawk. P. C. C., 14, § 11; 1 Hale P. C., 459.)

CHAPTER IV.

ARREST BY AN OFFICER WITHOUT A WARRANT.

SECTION 177. In what cases allowed.

178. May break open a door or window, if admittance refused.

179. May arrest at night, on reasonable suspicion of felony.

180. Must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape.

181. May take before a magistrate, a person arrested by a bystander for breach of the peace.

182. Magistrate may commit by verbal or written order, for offenses committed in his presence.

§ 177. In what cases allowed.—A peace officer may, without a warrant, arrest a person :

1. For a crime, committed or attempted in his presence ;

2. When the person arrested has committed a felony, although not in his presence ;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

New.

(a) **When magistrate may arrest.**—A magistrate may arrest for an affray on his own view, but not after it is over. (*McKay's case*, 5 C. H. Rec., 95.)

(b) **And this without warrant.** — Under the act of 1824, a justice of the peace may order the arrest of an offender on his own view without warrant. (*Farrell v. Warren*, 3 Wend., 258.)

(c) **Must be within the jurisdiction of justice.** — A justice of the peace, for misdemeanor in his view, cannot pursue the offender out of his jurisdiction. (*Butolph v. Blust*, 5 Lans., 84; 41 How., 481.)

A magistrate who witnesses an affray has power to issue process for the arrest of the offenders, of his own motion, at any time within twenty-four hours after the occurrence. (*Sands v. Benedict*, 2 Hun, 479; 5 S. C., 19.)

(d) **Constable may arrest.** — A constable has a right to arrest for a breach of the peace on his own view, without a warrant. (*Taylor v. Strong*, 3 Wend., 884.)

(e) **Prima facie case sufficient.** — An officer is justified in making an arrest without a warrant where there is "*prima facie*" ground for suspecting a felony has been committed. (*People v. Wolven*, 7 N. Y. Leg. Obs., 89; *Burns v. Erben*, 40 N. Y., 468; 1 Rob., 555.)

(f) **Peace officer may arrest without warrant, when** — A peace officer can only arrest for a breach of the peace, without a warrant, where the offense is committed in his presence. (*Boyleston v. Kerr*, 2 Daly, 220.)

A peace officer is not bound to arrest and detain a man as a felon merely on the information of a citizen. (*Work's case*, 5 C. H. Rec., 141.)

A watchman has no right to arrest a female whom he suspects of being a woman of ill fame, unless a suspicion of a felony, or there be an actual breach of the peace. (*People v. Bush*, 1 Wh. Cr. Cas., 187.)

(g) **Must have warrant to arrest under excise laws.** — A police officer, without warrant, has no power to arrest a person for violation of the excise law, by selling liquors without license, unless he is actually engaged in violating the law at time of the arrest, either at common law or under the act of 1857. (*Meyer v. Clark*, 9 J. & Sp., 107.)

Policeman may arrest without warrant, when. — A policeman in New York cannot arrest without warrant, except for an act tending to a breach of the peace committed in his immediate presence. (*Sternack v. Brooks*, 7 Daly, 142.)

(h) **When prisoner may be detained.** — In order to detain a person as a prisoner at a station-house during a recess of a police court, he must be charged with a felony or misdemeanor; not enough if it is only a finable offense. (*Schneider v. McLane*, 8 Keyes, 568.)

(i) **When woman may be arrested without warrant.** — A police officer, without process, is not authorized to arrest a woman as a common prostitute unless the offense was committed in his presence. (*People ex rel. Kingsley v. Pratt*, 22 Hun, 800.)

Law of other states. — Offenses committed in presence of officer. (5 Harr. [Del.], 505; 19 Ohio St., 248; 2 Hill, S. C., 619; 8 Serg. & R., 47; 9 Car. & P., 474; 5 El. & B., 188; 7 Cox C. C., 889.)

For felony. (12 Cush., 246; Id., 619; 71 Ill., 78; 1 Lead. C. C., 195.)

Probable cause. (30 Ga., 430; 14 Gray, 65; 6 Humph., 53; 1 Moody C. C., 634; 49 Ind., 56; 67 Pa. St., 30; 8 Serg. & R., 47; 5 Cush., 281.)

On charge of felony. (1 Doug. 359; 37 Mich., 299.)

§ 178. May break open a door or window, if admittance refused.—To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

New. (See cases cited under § 175, *ante*.)

§ 179. May arrest at night, on reasonable suspicion of felony.—He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it.

New. (See cases cited under § 170, *ante*.)

§ 180. Must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape.—When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.

New. (See cases cited under § 173, *ante*.)

§ 181. May take before a magistrate a person arrested by a bystander for breach of the peace.—A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

New.

A peace officer is not bound to arrest and detain a man as a felon, merely on the information of a citizen. (*Wark's case*, C. H. Rec., 4.)

§ 182. Magistrate may commit by verbal or written order, for offenses committed in his presence.—When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

New.

(a) **Not after offense is over.**—A magistrate may arrest for an affray on his own view, but not after it is over. (*McKay's case*, 5 C. H. Rec., 95.)

(b) **Justice of peace may.**— Under the act of 1824, a justice of the peace may order the arrest of an offender on his own view, without warrant. (*Furrell v. Warren*, 3 Wend., 253.)

(c) **Not beyond his jurisdiction.**— A justice of the peace, for a misdemeanor committed within his view, cannot pursue the offender and arrest him beyond jurisdiction of the justice. (*Butolph v. Blust*, 5 Lans., 84 ; 41 How., 481.)

(d) **Within what time after warrant may issue.**— A magistrate who witnesses an affray has power to issue process for the arrest of the offenders of his own motion at any time within twenty-four hours after the occurrence. (*Sands v. Benedict*, 2 Hun, 479 ; 5 S. C., 19.)

(e) **May arrest disorderly person.**— A justice presiding at a town meeting may make a parol order for the arrest of a disorderly person. (*Parsons v. Brainard*, 17 Wend., 522.)

(f) **May commit for perjury.**— Where a witness testifies to a palpable untruth in the presence of the court the power of the court to order the sheriff to take him into custody is undoubted. (*Linsday v. People*, 67 Barb., 550.)

It is a case of discretion with the court whether to order him taken into custody, or direct other proceedings to be taken against him for perjury. (*Id.*)

CHAPTER V.

ARREST BY A PRIVATE PERSON.

SECTION 183. In what cases allowed.

184. Must inform the party of the cause of arrest, except when actually committing the offense or on pursuit after escape.

185. Must immediately take prisoner before a magistrate, or deliver him to a peace officer.

§ 183. In what cases allowed. — A private person may arrest another :

1. For a crime committed or attempted in his presence ;
2. When the person arrested has committed a felony, although not in his presence.

New.

Any citizen may arrest one who is actually committing a breach of the peace. (*Wallace's case*, 4 C. H. Rec., 111.)

(a) **But not after affray is over.**— A private person cannot arrest for an affray without a warrant after it is over. (*Phillips v. Trull*, 11 Johns., 486.)

(b) **May arrest felon.**— A felon may be arrested by a private person without a warrant. (*Holley v. Mix*, 3 Wend., 350 ; *People v. Adler*, 3 Park., 249.)

(c) **Reasonable ground of suspicion enough.**— If an innocent person be so arrested, the party arresting is excused, if a felony was in fact com-

mitted, and there was reasonable ground for suspicion. (*Halley v. Mix*, 3 Wend., 350.)

Not so, however, if no felony was committed. (*Id.*)

(d) **Any person may arrest felon.**—Any person has a right to arrest a felon and bring him before the proper authority, and it is the duty of every citizen to do so. (*People v. McArdle*, 1 Wheeler's cases, 101; *People v. Adler*, 3 Park., 249.)

And he may do so either at the time of the commission of the felony or subsequent thereto. (*Willis v. Warren*, 17 How., 100.)

(e) **Not so in case of misdemeanor.**—A private person may arrest a felon without warrant, but for misdemeanor must have a magistrate's warrant. (*People v. Adler*, 3 Park., 249.)

(f) **Reasonable ground of suspicion excuses.**—Any person may arrest without a warrant where there is probable cause that a felony had been committed, though in fact none has been committed. (*Burns v. Erben*, 40 N. Y., 463; 1 Rob., 555; *Hawley v. Buller*, 54 Barb., 490.)

(g) **In other states and at common law.**—In presence of private person. (1 Root, 66; 10 Clark & F., 28; 1 Lead. [S. C.], C. C., 177.)

(A) **For felony.**—12 Ga., 818; 48 N. H., 877.

(i) **Reasonable cause.**—32 N. J. L., 70; 8 Serg. & R., 47; 6 Benn., 816; 66 Ind., 464; 2 Den., 58; 3 Jones (N. C.), 434; 60 Penn. St., 353; 2 Selw. N. P., 943.

§ 184. Must inform the party of the cause of arrest, except when actually committing the offense or on pursuit after escape.—A private person, before making an arrest, must inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission.

New. Notice of arrest must be given expressly or by implication. (27 Cal., 572; 76 N. C., 10; 9 Coke, 65; 1 Moody C. C., 207.) So a private person arresting another must notify him of his intention. (65 N. C., 327.) Not so, however, when party arrested was engaged in the commission of a crime. (37 Cal., 572.)

§ 185. Must immediately take prisoner before a magistrate, or deliver him to a peace officer.—A private person, who has arrested another for the commission of a crime, must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer.

New. (See cases cited under § 165, *ante*.)

CHAPTER VI.

RETAKING, AFTER AN ESCAPE OR RESCUE.

SECTION 186. May be at any time, or in any place in the state

187. May break open a door or window, if admittance refused.

§ 186. **May be at any time, or in any place in the state.**

If a person arrested escape or be rescued, the person, from whose custody he escaped or was rescued, may immediately pursue and retake him, at any time, and in any place in the state.

New. (*Cooper v. Adams*, 2 Blackf., 294; *Com. v. Sheriff*, 1 Grant, Pa., 187; 1 Chitty Cr. L., 61; 1 Bish. Cr. Proc., § 163.)

§ 187. **May break open a door or window, if admittance refused.**—To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open an outer or inner door or window of a building.

New. (See cases cited under §§ 175, 176, *ante*.)

CHAPTER VII.

EXAMINATION OF THE CASE, AND DISCHARGE OF THE DEFENDANT OR HOLDING HIM TO ANSWER.

SECTION 188. Magistrate to inform defendant of the charge, and his right to counsel.

189. Time to send, and sending for counsel.

190. On appearance of counsel, or waiting for him a reasonable time examination to proceed.

191. When to be completed; adjournment.

192. On adjournment, defendant to be committed, or discharged on deposit of money.

193. Form of commitment.

194. Depositions, to be read on examination, and witnesses examined.

195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf.

196. Defendant to be informed of his right to make a statement.

197. Waiver of his right, and its effect.

198, 199. Statement, how taken.

200. How reduced to writing, and authenticated.

201. After statement or waiver, defendant's witnesses to be examined.

202. Witnesses to be kept apart.

203. Who may be present at examination.

204. Testimony, how taken and authenticated.

205. Depositions and statement, how and by whom kept.

- SECTION 206. Defendant entitled to copies of depositions and statement.
 207. Defendant, when and how to be discharged.
 208. When and how to be committed.
 209. Order for commitment.
 210. Certificate of bail being taken.
 211. Defendant to choose how he shall be tried.
 212. Order for bail, on commitment.
 213, 214. Form of commitment.
 215. Undertaking of witnesses to appear, when and how taken.
 216. Security for appearance of witness, when and how required.
 217. Infants and married women may be required to give security for appearance as witnesses.
 218. Witness to be committed, on refusal to give security for appearance.
 219. Witness, unable to give security, may be conditionally examined.
 220. Last section not applicable to prosecutor or accomplice.
 221. Magistrate to return depositions, statement and undertakings of witnesses, to the court.

§ 188. Magistrate to inform defendant of the charge, and his right to counsel. — When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

§ R. S., 1000, § 14; New York Const., art. I, § 6. It is his right to have counsel present. (*People v. Restell*, 8 Hill, 289; *Son v. People*, 12 Wend., 344.)

§ 189. Time to send, and sending for counsel. — He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the town or city, as the defendant may name. The officer must, without delay and without fee, perform that duty.

Id.

If desired by the accused he has the right to have his counsel present during the examination. (*People v. Restell*, 8 Hill, 289; *Son v. People*, 12 Wend., 344.) Reasonable time after the arrest should be allowed for the purpose of employing counsel, where the accused requests it. (*Id.*; *Son v. People*, 12 Wend., 344.)

§ 190. (Amended 1882.) On appearance of counsel, or waiting for him a reasonable time, examination to proceed. — The magistrate, immediately after the appearance of counsel, or if

none appear and the defendant require the aid of counsel, must, after waiting a reasonable time therefor, proceed to examine the case, unless the defendant waives examination and elects to give bail, in which case the magistrate must admit the defendant to bail if the crime is bailable, as provided in section two hundred and ten; and in that case witnesses in attendance or shown to be material for the people may be required to appear and testify, or to be examined conditionally as prescribed in sections two hundred and fifteen, two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, two hundred and nineteen and two hundred and twenty.

Id.

§ 191. (Amended 1882.) **When to be completed; adjournment.** — The examination must be completed at one session, unless the magistrate, for good cause shown, adjourn it. The adjournment cannot be for more than two days at each time, [] unless by consent or on motion of the defendant.

New.

(a) **Magistrate must have prisoner before him.** — A magistrate has no authority to commit for a hearing on a subsequent day until the accused has been first brought before him. (*Pratt v. Hill*, 16 Barb., 303; see cases cited under § 165, *ante*.)

(b) **Crime against United States.** — A state magistrate may commit for a further hearing touching a crime against the United States. (*Ex parte Smith*, 5 Cow., 273.)

In a temporary commitment by a magistrate for further examination on a charge of larceny, not necessary to state whether grand or petit. (*People v. Nash*, 5 Park., 473; 16 Abb., 281.)

§ 192. **On adjournment, defendant to be committed, or discharged on deposit of money.** — If an adjournment be had for any cause, the magistrate must commit the defendant for examination, or discharge him from custody, upon his giving bail to appear during the examination, or upon the deposit of money as provided in this Code, to make sure of his appearance at the time to which the examination is adjourned.

New.

§ 193. **Form of commitment.** — The commitment for examination is by an indorsement signed by the magistrate, on the warrant of arrest, to the following effect: "The within named A. B., having been brought before me under this warrant, is com-

mitted for examination, to the sheriff of the county of _____," or the city and county of New York, "to the keeper of the city prison of the city of New York."

New.

(a) **Not under seal.** — Warrant of commitment need not be under seal. (*People v. Ransom*, 61 Barb., 619; *Gano v. Hall*, 5 Park., 651.)

(b) **Must show probable guilt.** — A commitment is irregular unless it show on its face that the justice had determined that there was probable cause to believe the prisoner guilty of the offense charged. (*People v. Rhoner*, 4 Park., 166.)

(c) **Must have prisoner present in order to commit.** — A magistrate has no authority to commit for a hearing on a subsequent day until the accused has been brought before him. (*Pratt v. Hill*, 16 Barb., 303.)

(d) **Surety of peace; warrant in.** — A justice, after deciding a case of surety of the peace, and permitting the defendant to depart, may subsequently issue a warrant of commitment. (*Gano v. Hall*, 42 N. Y., 87; 5 Park., 651.)

(e) **Commitment must be directed to an officer.** — A warrant of commitment not directed to an officer or class of officers is void, and will be no protection to the officer who executes it. (*Russell v. Hubbard*, 6 Barb., 654.)

A State magistrate may commit for a further hearing touching a crime against the United States. (*Ex parte Smith*, 5 Cow., 273.)

(f) **Form of recorder's commitment.** — Form of commitment by the recorder of New York of a person indicted in court of sessions for larceny. (3 Park., 143.)

(g) **At special sessions; form of.** — A commitment issued upon conviction in special sessions need not contain a statement that the defendant, when brought before magistrate, requested to be tried by court of special sessions. (*People v. Moore*, 3 Park., 465.)

§ 194. Depositions, to be read on examination, and witnesses examined. — At the examination, the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and if the defendant request it, or elects to have the examination, must summon for cross-examination the witnesses so examined, if they be in the county. He must also issue subpoenas for additional witnesses required by the prosecutor or defendant.

New.

(a) **Deposition not evidence.** — A deposition taken before a committing magistrate is not evidence against the defendant, unless the witnesses were examined in his presence and the right of cross-examination accorded. (*People v. Restell*, 3 Hill, 289.)

A deposition taken under the police law of 1844 is not admissible without proof of inability to obtain the personal attendance of witnesses. (*People v. Hadden*, 3 Den., 220.)

§ 195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf.—The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

New. (8 R. S., 1000, § 18.)

(a) **Witnesses must be examined in presence of prisoner.**—Witnesses before committing magistrate must be examined in presence of defendant, who must have right of cross-examining them. (*People v. Restell*, 3 Hill, 289; *Bebee v. People*, 5 id., 38.)

(b) **Prisoner must have witnesses if he desires it, and counsel.**—On a preliminary hearing, the defendant is entitled to have his examination taken, to have witnesses sworn and examined on his behalf, and have the assistance of counsel. (*Son v. People*, 12 Wend., 344.)

§ 196. Defendant to be informed of his right to make a statement.—When the examination of the witnesses on the part of the people is closed, the magistrate must inform the defendant, that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge and to explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial.

Id., § 15; 1 R. L., 307, § 2.

(a) **Must be informed of his rights.**—On a judicial examination before a magistrate of a prisoner charged with crime, the accused must be informed as to his rights in refusing to answer questions put to him. (*People v. McMahon*, 2 Park., 669, 670; see, also, *People v. Hendrickson*, 1 Park., 416, and cases cited, where the question is fully discussed; see, also, *People v. Maxwell*, 1 Wh. C. C., 163.)

(b) **Cannot be made to criminate himself.**—The statements or oath of a party accused cannot be given in evidence against him. (*Lewis' case*, 6 Carr & P., 161; *David's case*, Id., 177; *Owens' case*, 9 id., 288; *Haworth's case*, 4 id., 254.)

(c) **Prisoner's testimony while under arrest inadmissible.**—Testimony of prisoner while under arrest cannot be used against him. (9 How., 155; 8 id., 402.)

§ 197. Waiver of his right and its effect.—If the defendant waive his right to make a statement, the magistrate must make a note thereof, immediately following the depositions of the witnesses against the defendant.

New.

§ 198. **Statement, how taken.** — If the defendant choose to make a statement, the magistrate must proceed to take it in writing, without oath, and must put to the defendant the following questions only :

What is your name and age ?

Where were you born ?

Where do you reside, and how long have you resided there ?

What is your business or profession ?

Give any explanation you may think proper, of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation.

3 R. S., 1000, § 10.

See *Bellinger v. People*, 8 Wend., 595 ; *People v. Moore*, 15 id., 419 ; see, also, *Ex parte Boswell*, 34 How., 347.

§ 199. **Statement, how taken.** — The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may thereupon correct or add to his answer, and it must be corrected until it is made conformable to what he declares to be the truth.

3 R. S., 1000, §§ 16, 19.

§ 200. **How reduced to writing and authenticated.** — The statement must be reduced to writing by the magistrate, or under his direction, and authenticated in the following manner :

1. The authentication must set forth, in detail, that the defendant was informed of his rights as provided in section one hundred and ninety-six, and that, after being so informed, he made the statement ;

2. It must contain the questions put to him, and his answers thereto, as provided in sections one hundred and ninety-eight and one hundred and ninety-nine ;

3. It may be signed by the defendant, or he may refuse to sign it ; but if he refuse to sign, his reason therefor must be stated as he gives it ;

4. It must be signed and certified by the magistrate.

3 R. S., 1000, § 16.

People v. Restell, 3 Hill, 289 ; see, also, *Bellinger v. People*, 8 Wend., 595 ; *People v. Moore*, 15 id., 419.

The prisoner's statement need not be signed by him in order to make it evidence. (*People v. Johnson*, 1 Wh. C. C., 198 ; *People v. Webster*, 3 Park., 508 ; 14 How., 242.)

§ 201. **After statement of waiver, defendant's witnesses to be examined.**— After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produce any, must be sworn and examined.

Id., § 17.

§ 202. **Witnesses to be kept apart.**— The witnesses produced on the part either of the people or of the defendant cannot be present at the examination of the defendant ; and while a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

3 R. S., 1000, § 18.

§ 203. **Who may be present at examination.**— The magistrate must also, upon the request of the defendant, exclude from the examination every person, except the clerk of the magistrate, the prosecutor and his counsel, the attorney general, the district attorney of the county, the defendant and his counsel and the officer having the defendant in custody.

New.

§ 204. (Amended 1882.) **Testimony, how taken and authenticated.**— The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate or under his direction, and authenticated in the following manner :

1. The authentication must state the name and age of the witness, his place of residence, and his business or profession ;

2. It must, unless deposition by question and answer be waived by the defendant and the witness, contain the questions put to the witness and his answers thereto, each answer being distinctly read to him as it is taken down and being corrected or added to, until it is made conformable to what he declares to be the truth ;

3. If a question put be objected to on either side, and overruled, or the witness decline answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated ;

4. The deposition must be signed by the witness, or if he refuse to sign it, his reason for refusing must be stated in writing as he gives it ;

5. It must be signed and certified by the magistrate.

3 R. S., 1000, § 19.

(a) **Prisoner may cross-examine witnesses.** — A deposition taken before a committing magistrate is not evidence against the defendant, unless the witnesses were examined in his presence, and the right of cross-examination accorded. (*People v. Bestell*, 3 Hill, 289.)

(b) **Need not reduce evidence to writing.** — *Held*, magistrate not bound to reduce testimony to writing. (*Ex parte Boswell*, 34 How., 347.)

(c) **Need not be signed.** — The prisoner's examination need not be signed by him in order to make it evidence. (*People v. Johnson*, 1 Wh. C. C., 193.)

(d) **Magistrate may commit for refusal to be sworn.** — Where a prisoner refuses to be sworn and examined as to the cause of his intoxication, the magistrate has no power to commit him for refusal. (*People v. Webber*, 3 Park., 503; 14 How., 242.)

§ 205. **Depositions and statement; how and by whom kept.** — The magistrate or his clerk must keep the depositions taken on the information or on the examination, and the statement of the defendant, if any, until they are returned to the proper court; and must not permit them to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney general, the district attorney of the county, and the defendant and his counsel.

3 R. S., 1001, § 28.

§ 206. **Defendant entitled to copies of depositions and statement.** — If the defendant be held to answer the charge, the magistrate or his clerk having the custody of the depositions taken on the information or examination, and of the statement of the defendant, must, on payment of his fees at the rate of five cents for every hundred words, and within two days after demand, furnish to the defendant, or his counsel, a copy of the depositions and statement, or permit either of them to take a copy.

New.

§ 207. **Defendant, when and how to be discharged.** — After hearing the proofs, and the statement of the defendant, if he have made one, if it appear, either that a crime has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement, signed by him, to the following effect: "There being no

sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

3 R. S., 1000, § 20.

(a) **Committing magistrate may discharge.** — A magistrate, if he be satisfied that there is no cause for a commitment, may discharge the party accused. (*Secor v. Babcock*, 2 Johns., 208.)

(b) **But not after taking bail.** — After a prisoner has given bail to the court of sessions the committing magistrate cannot discharge him. (*Sandrock v. Knop*, 34 How., 191.)

§ 208. **When and how to be committed.** — If, however, it appear from the examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect: "It appearing to me by the within depositions [and statement, if any] that the crime therein mentioned [or any other crime according to the fact, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within named guilty thereof, I order that he be held to answer the same."

New.

(a) **Need not be under seal.** — A warrant of commitment need not be under seal. (*People v. Rawson*, 61 Barb., 619; *Gano v. Hall*, 5 Park., 651; 42 N. Y., 67.)

(b) **Must show probable cause of guilt.** — A commitment is irregular unless it show upon its face that the justice had determined there was probable cause to believe the prisoner guilty of the offense charged. (*People v. Rhoner*, 4 Park., 166.)

(c) **Prisoner must be present.** — A magistrate has no authority to commit for a hearing on a subsequent day until the accused has been brought before him. (*Pratt v. Hill*, 16 Barb., 303.)

(d) **Must be directed properly.** — A warrant of commitment not directed to an officer, or a class of officers, is void. (*Russell v. Hubbard*, 6 Barb., 654.)

(e) **For crime against United States.** — A state magistrate may commit for a further hearing touching a crime against the United States. (*Ex parte Smith*, 5 Cow., 273.)

(f) **May commit for perjury.** — If a witness testify to a palpable untruth in the presence of the court, he may be ordered into custody for perjury. (*Lindsay v. People*, 67 Barb., 548.)

(g) **May amend mittimus.** — A justice of the peace may amend his mittimus after a defendant has been imprisoned on it. (*Ex parte Hogan*, 55 How., 453.)

(A) **What must state.** — A *mittimus* issued by a justice of the peace or a police justice on a conviction for petit larceny, which simply states the offense, conviction and judgment thereon, without averring the jurisdictional facts, is sufficient. (*Ex parte Hogan*, 55 How., 458.)

§ 209. **Order for commitment.**—If the crime be not bailable, the following words, or words to the same effect, must be added to the indorsement: "And that he be committed to the sheriff of the county of _____," [or in the city and county of New York, "to the keeper of the city prison of the city of New York."]

New. (See cases cited in § 208, *ante*.)

§ 210. **Certificate of bail being taken.**—If the crime be bailable, and bail be taken by the magistrate, the following words, or words to the same effect, must be added to the indorsement mentioned in section two hundred and eight: "And I have admitted him to bail to answer, by the undertaking hereto annexed."

New. (See *People v. Hurlbut*, 44 Barb., 126.)

§ 211. **Defendant to choose how he shall be tried.**—If the crime with which the defendant is charged be one triable, as hereinbefore provided, by a court of special sessions of the county in which the same was committed, the magistrate, before holding the defendant to answer, must inform him of his right to be tried by a jury after indictment, and must ask him how he will be tried. If the defendant shall require to be tried by a jury after indictment, he can only be held to answer to a court having authority to inquire by the intervention of a grand jury into offenses triable in the county. If he shall not so require, he may be held to answer at the court of special sessions.

New.

(a) **The election must be unequivocal.** — The election to be tried by a magistrate is a positive act and must be distinctly made, or the magistrate acquires no jurisdiction to try the offender. (*People v. Lied*, 19 Alb. L. J. 400.)

(b) **Simple plea of not guilty with bail, not enough.** — Pleading not guilty and giving bail for appearance at a future day before such magistrate, is not sufficient to confer upon a magistrate jurisdiction to try him. (*Id.*)

Especially when he offers to waive examination and give bail for his appearance at the oyer and terminer or general sessions. (*Id.*; *People v. Putnam*, 3 Park., 386; *Hill v. People*, 20 N. Y., 363.)

(c) **Waiver must be express.**—The special sessions cannot acquire jurisdiction to try a prisoner for a crime, unless he expressly waives the right to be tried by a jury. (*People v. Mallon*, 89 Barb., 454.)

It will not do to ask him if he elects to be tried by this court; the question if he waives a trial by jury must be clearly put. (*Id.*)

(d) **Waiver must appear in minutes.**—And where this does not appear in the minutes or record, the conviction is void. (*Id.*; see *contra*, *People v. Goodwin*, 5 Wend., 251.)

(e) **Prisoner cannot recall waiver.**—A prisoner having once waived the right to trial by jury and having elected to be tried by special sessions, cannot recall the waiver. (*People v. Riley*, 5 Park., 401.)

(f) **When prisoner elects he waives all jurisdictional questions.**—Where a person elects to be tried by special sessions, he waives all jurisdictional objections. (*Gill v. People*, 3 Hun, 187.)

§ 212. **Order for bail, on commitment.**—If the crime be bailable and the defendant be admitted to bail, but bail have not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section two hundred and eight, “and that he be admitted to bail in the sum of _____ dollars, and be committed to the sheriff of the county of _____,” [or in the city and county of New York, “to the keeper of the city prison of the city of New York,”] until he gives such bail.”

New.

§ 213. **Form of commitment.**—If the magistrate order the defendant to be committed, as provided in sections two hundred and nine and two hundred and twelve, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or if that officer be not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

New. (See § 198, *ante*, and cases there cited; also § 208, *ante*, and cases there cited.)

§ 214. **Form of commitment.**—The commitment must be to the following effect:

“COUNTY OF ALBANY [or as the case may be].

“In the name of the people of the State of New York:

“To the sheriff of the county of Albany” [or in the city and county of New York, “to the keeper of the city prison of the city and county of New York”].

"An order having this day been made by me, that A. B. be held to answer to the court of upon a charge of [stating briefly the nature of the crime], you are commanded to receive him into your custody, and detain him until he be legally discharged.

"Dated at the *City of Albany* [or as the case may be], this
day of , 18 .

"C. D.,

"*Justice of the Peace.*"

[Or as the case may be.]

New. (See § 193, *ante*, and cases there cited; also § 206 and cases there cited.)

§ 215. Undertaking of witnesses to appear; when and how taken. — On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people, a written undertaking, to the effect that he will appear and testify at the court to which the depositions and statement are to be sent, or that he will forfeit the sum of one hundred dollars.

3 R. S., 100, § 21; 2 R. L., 507, § 2.

§ 216. Security for appearance of witnesses; when and how required. — When the magistrate is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify, unless security be required, he may order the witness to enter into a written undertaking, with such sureties, and in such sum as he may deem proper, for his appearance as specified in the last section.

Id., § 23.

§ 217. Infants and married women may be required to give security for appearance as witnesses. — Infants and married women, who are material witnesses against the defendant, may in like manner be required to procure sureties for their appearance, as provided in the last section.

Id., § 24.

§ 218. Witnesses to be committed on refusal to give security for appearance. — If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the

magistrate must commit him to prison until he comply or be legally discharged.

Id., § 25.

§ 219. **Witness, unable to give security, may be conditionally examined.** — When, however, it satisfactorily appears, by the examination on oath of the witness or of any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined, on behalf of the people, in the manner and with the effect provided in this Code, and must thereupon be discharged.

New. (See §§ 620-635, *post.*)

§ 220. **Last section not applicable to prosecutors or accomplices.** — The last section does not apply to the prosecutor or to an accomplice in the commission of the crime charged.

New.

§ 221. **Magistrate to return depositions, statements and undertakings of witnesses, to the court.** — When a magistrate has discharged a defendant, or has held him to answer, as provided in sections two hundred and seven and two hundred and eight, he must return to the next court of oyer and terminer or court of sessions of the county, or city court having power to inquire into the offense by the intervention of a grand jury, at or before its opening on the first day, the warrant, if any, the depositions, the statement of the defendant, if he have made one, and all undertakings of bail, or for the appearance of witnesses, taken by him.

3 R. S., 1001, § 28; see §§ 194 and 205, and cases *ante* and cases there cited.

TITLE IV.

OF PROCEEDINGS AFTER COMMITMENT, AND BEFORE
INDICTMENT.

CHAPTER I. Preliminary provisions.

II. Formation of the grand jury; its powers and duties.

CHAPTER I.

PRELIMINARY PROVISIONS.

SECTION 222. Crimes ; how prosecuted.

§ 222. **Crimes ; how prosecuted.** — All crimes prosecuted in a court of oyer and terminer, or in a court of sessions, or in a city court, must be prosecuted by indictment.

New. (N. Y. Const., art. I, § 6 ; U. S. Const., art. V ; 1 R. S., 876, § 12.)

CHAPTER II.

FORMATION OF THE GRAND JURY, ITS POWERS AND DUTIES.

SECTION 223, 224. Grand jury defined.

225, 226, 227. For what courts to be drawn; the order.

228. Misdemeanors.

229. Mode of selecting grand jurors.

230. If sixteen grand jurors do not appear, additional number to be ordered.

231, 232, 233. Manner of designating the additional grand jurors.

234. Summoning the additional grand jurors, and compelling their attendance.

235. When new grand jury may be summoned for the same court.

236. Grand jury, how drawn when more than a sufficient number attends.

237. Who may challenge an individual grand juror.

238. Causes of discharge of the panel.

239. Causes of challenge to an individual grand juror.

240. Manner of taking and trying the challenges.

241. Decision upon the challenge.

242. Effect of allowing a challenge to an individual grand juror.

243. Violation of last section.

244. Appointment of foreman.

245, 246, 247. Oath of the foreman and the other grand jurors.

248. Charge of the court.

- SECTION 249.** Retirement of the grand jury.
 250. Appointment of a clerk, and his duties.
 251. Discharge of the grand jury.
 252. Power of grand jury to inquire into crimes, etc.
 253. Foreman may administer oaths.
 254. Definition of indictment.
 255. Evidence receivable before the grand jury.
 256. Same.
 257. Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced.
 258. Degree of evidence to warrant an indictment.
 259. Grand jurors must declare their knowledge as to commission of a crime.
 260. Grand jury must inquire as to persons imprisoned on criminal charges and not indicted; the condition of public prisons, and the misconduct of public officers.
 261. Grand jury entitled to access to public prisons, and to examine public records.
 262, 263, 264. When and from whom they may ask advice, and who may be present during their sessions.
 265. Secrets of the grand jury to be kept.
 266. Grand jury; when bound to disclose the testimony of a witness.
 267. Grand juror not to be questioned for his conduct as such.

§ 223. Grand jury defined. — A grand jury is a body of men, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, and chosen by lot, and sworn to inquire of crimes committed or triable in the county.

3 R. S., 1018, § 26; 1 R. S., 376, § 12.

A grand jury has full power to make inquiry and present, by indictment, all persons charged with crime. (*People v. Hylar*, 1 Park., 566; *French v. People*, 3 id., 114; *People v. Paige*, Id., 600; *People v. Horton*, 4 id., 222; *People v. Hefferman*, 5 id., 393.)

How selected at common law. (2 Hawk., P. C., ch. 25, § 16; 1 Bish. Crim. Proc., § 849.)

§ 224. Grand jury defined. — The grand jury must consist of not less than sixteen and not more than twenty-three persons, and the presence of at least sixteen is necessary for the transaction of any business.

3 R. S., 1018, § 26.

(a) **Number at common law.** — A common-law grand jury must contain not over twenty-three nor under twelve. (1 Bish. Crim. Proc., § 854; 1 Chitt. Cr. L., 311; *Re v. Marsh*, 1 Nev. & P., 187; *Harding v. State*, 22 Ark., 210; *People v. Gatewood*, 20 Cal., 146; *Keech v. State*, 15 Fla., 591; *Barron v. People*, 73 Ill., 256; *Leathers v. State*, 26 Miss., 73.)

(b) **Error to swear twenty-four.** — It is error to swear twenty-four persons as a grand jury. (*People v. King*, 2 Caines, 98.)

(c) **Objection must be taken in court below.**—However a conviction will not be reversed because the indictment purports to have been found by twenty-four grand jurors, if the objections were not taken in court below. (*Conkey v. People*, 1 Abb. Dec., 418; 5 Park., 81.)

(d) **Twelve must concur.**—In England and all our states twelve of the grand jurors must consent in order to render the finding valid. (2 Hawk. P. C., ch. 25, § 16; *State v. Miller*, 8 Ala., 348; *Hudson v. State*, 1 Blackf. 817; *State v. Davis*, 2 Ire., 153; *Com. v. Sayers*, 8 Leigh, 723; *Low's case*, 4 Greenf., 439; *State v. Clayton*, 11 Rich., 581; *State v. Symonds*, 36 Me., 128.)

(e) **May move to quash on ground of less than twelve.**—The prisoner, on his arraignment, may move to quash the indictment on the ground that twelve grand jurors did not concur. (*People v. Shattuck*, 6 Abb. [N. C.], 83.)

§ 225. (Amended 1882.) **For what courts to be drawn; the order.**—A grand jury must be drawn for every term of the following courts:

1. The court of oyer and terminer, except in the city and county of New York, and the county of Kings, and except for extraordinary or adjourned terms;

2. The court of general sessions of the city and county of New York and the court of sessions of the county of Kings; and

3. The city courts whenever an indictment can be there found.

New in form. (See 3 R. S., 1016, §§ 10, 11.)

§ 226. (Amended 1882.) **For what courts to be drawn; the order.**—A grand jury may also be drawn:

1. For every other court of sessions, when specially ordered by the court or by the board of supervisors;

2. For the court of oyer and terminer in the city and county of New York, upon the order of a judge of the supreme court, elected in the first judicial district;

3. For the court of oyer and terminer of the county of Kings, upon the order of a judge of the supreme court elected in the second judicial district.

New in form. (See *Id.*)

§ 227. **For what courts to be drawn; the order.**—If made by the court or a judge thereof, the order for a grand jury must be entered upon its minutes, and a copy thereof filed with the county clerk. at least twenty days before the term for which the jury is ordered. If made by the board of supervisors a copy thereof, certified by the clerk of the board, must be filed with the county clerk, at least twenty days before the term; and

when so filed, is conclusive evidence of the authority for drawing the jury.

New in form. (See *Id.*)

§ 228. **Misdescription in order.** — A misdescription of the title of the court in an order for a grand jury does not affect the validity of the order, if it can be plainly understood therefrom what court is intended.

§ 229. **Mode of selecting grand jurors.** — The mode of selecting grand jurors is prescribed by special statutes.

New. (See Code Civil Proc., §§ 2293-2301, 3314, 3351.)

(a) **Color of lawful authority enough.** — It is sufficient to the validity of an indictment that the grand jury acted under color of lawful authority. The prisoner cannot plead that it was irregularly organized. (*People v. Dolan*, 6 Hun, 232; *Id.*, 493; 64 N. Y., 485.)

(b) **What sufficient, warrant or venire.** — A general warrant or venire under the seal of the court to the sheriff, to summon grand and petit jurors for the trial of all the causes which are to be tried before the court of general sessions, is sufficient. And there need not be a venire in each particular case. (*People v. Gen. Sess. of Herkimer*, 20 Johns., 310.)

(c) **Precept not necessary.** — It seems, however, that the issuing of precept is not necessary to give validity to the acts of the grand jury, it having been regularly drawn and summoned. (*People v. Robinson*, 2 Park., 235; *People v. Cummings*, 3 *id.*, 343; *McCann v. People*, *Id.*, 272; *contra*, *McGuire v. People*, 2 Park., 148.)

(d) **Objections to grand jury, when taken.** — Objection to organization of grand jury is too late after issue joined, and case on part of people has been gone through with. (*People v. Griffin*, 2 Barb., 427.)

(e) **What irregularity ground for quashing.** — It is no ground for quashing an indictment, that the list from which the grand jury was drawn, contained one less than the number required by statute. (*People v. Harriatt*, 3 Park., 112.)

§ 230. **If sixteen grand jurors do not appear, additional number to be ordered.** — If at any court of oyer and terminer or court of sessions, except in the counties of Genesee, Orleans, and St. Lawrence, there shall not appear at least sixteen persons, duly qualified to serve as grand jurors, who have been summoned, or if the number of grand jurors attending shall be reduced below sixteen, such court must, by order to be entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of grand jurors as shall be necessary, and must specify the number required in the order.

3 R. S., 1018, § 23.

§ 231. **Manner of designating the additional grand jurors.** — The clerk of the county must forthwith bring into the court the box containing the names of the grand jurors, from which grand jurors in the county are required to be drawn; and he must, in the presence of the court, proceed publicly to draw the number of grand jurors specified in the order; and when such drawing is completed, he must make two lists of the persons so drawn, each of which must be certified by him to be a correct list of the names of the persons so drawn by him, one of which he must file in his office, and the other he must deliver to the sheriff.

Id.

§ 232. **Manner of designating the additional grand jurors.** — The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated in the list, provided in section two hundred and thirty-one, to appear in the court requiring their attendance at the time designated, and they must attend and serve as if they had been originally summoned as grand jurors, and subject to the same penalties, unless excused or discharged by the court.

Id., § 24.

§ 233. (Amended 1882.) **Manner of designating the additional grand jurors.** — In the counties of Genesee, Orleans and St. Lawrence, the names of the persons required to complete the grand jury may, in the discretion of the court, be drawn as provided in the last section, or may be publicly designated by the court, from the bystanders or the body of the county.

Id., § 23.

§ 234. **Summoning the additional grand jurors, and compelling their attendance.** — The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated, as provided in the last two sections, who must attend and serve as if they had been originally summoned as grand jurors, and are subject to the same penalties, unless excused or discharged by the court.

Id., § 24.

§ 235. **When new grand jury may be summoned for the same court.** — If a crime be committed during the sitting of

the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered, that the sheriff summon another grand jury; and the same shall be summoned, in the manner prescribed for grand juries in general.

3 R. S., 1019, §§ 34, 35.

(a) **May have two grand juries.** — Under the Code there may be two grand juries sitting in the same county at the same time. (*Allen v. People*, 57 Barb., 338.)

§ 236. **Grand jury, how drawn when more than a sufficient number attends.** — When more than twenty-three persons summoned as grand jurors attend for service, the clerk must prepare separate ballots containing their names, folded as nearly alike as possible, and so that the names cannot be seen, and must deposit them in a box. He must then openly draw out of the box twenty-three ballots; and the persons whose names are drawn constitute the grand jury. The names remaining in the box, as well as those drawn, must be returned to the box of drawn grand jurors.

New.

(a) **Error to swear twenty-four jurors** — It is error to swear twenty-four persons on a grand jury. (*People v. King*, 2 Caines, 98.)

(b) **Objection to grand jury must be raised at trial court.** — A conviction will not be reversed because the indictment purports to have been found by twenty-four grand jurors, if the objections were not taken in the court below. (*Conkey v. People*, 1 Abb. Dec., 418; 5 Park., 31.)

§ 237. **Who may challenge an individual grand juror.** — A person held to answer a charge for a crime may challenge an individual grand juror.

2 R. S., 1018, § 27.

(a) **So at common law.** — At common law, anyone under prosecution for any crime whatever had the right of challenge. (2 Hawk. P. C., ch. 25, § 16. 1 Bish. Crim. Proc., § 876.)

If the right to challenge a grand juror be denied, the indictment is void but it must be claimed at the time. (18 Cal., 93, 14 id., 566; *Conkey v. People*; 1 Abb. Dec., 418; 5 Park., 31.)

§ 238. **Causes of discharge of the panel.** — There is no challenge allowed to the panel or to the array of the grand jury but the court may, in its discretion, at any time discharge the

panel and order another to be summoned, for one or more of the following causes :

1. That the requisite number of ballots was not drawn from the grand jury box of the county ;
2. That notice of the drawing of the grand jury was not given ;
3. That the drawing was not had, in the presence of the officers designated by law ; and
4. That the drawing was not had, at least fourteen days before the court.

Id. § 28.

(a) **No challenge to the array.**—A challenge to the array of grand jurors cannot be allowed. (*Carpenter v. People*, 64 N. Y., 483.)

(b) **Not so in other states.**—(*Van Hook v. State*, 13 Texas, 252; *Boles v. State*, 24 Miss., 445; *State v. Brooks*, 9 Ala., 9; *Bellair v. State*, 6 Blackf., 104.)

(c) **What ground of challenge.**—A challenge to the array will not be allowed on the ground that in the selection of grand jurors all persons belonging to a particular fraternity or association were excluded. (*People v. Jewett*, 3 Wend., 214.)

It is no ground for quashing an indictment that the list from which the grand jurors were drawn contained one name less than the number required by statute. (*People v. Harriott* 3 Park., 112; *Dolan v. People*, 64 N. Y., 485.)

§ 239. **Causes of challenge to an individual grand juror.**—A challenge to an individual grand juror may be interposed for one or more of the following causes, and for these only :

1. That he is a minor ;
2. That he is an alien ;
3. That he is insane ;
4. That he is the prosecutor upon a charge against the defendant ;
5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking, as such ;
6. That a state of mind exists on his part, in reference to the case or to either party, which satisfies the court, in the exercise of sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging.

Id

(a) **Need not be a freeholder.**—It is not a good plea to an indictment that one of the grand jurors by whom it was found was not a freeholder. (*People v. Jewett*, 3 Wend., 814; 6 id., 386; *Dolan v. People*, 64 N. Y., 485.)

(b) **Expressing an opinion good cause.**—It is good cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of the party. (*People v. Jewett*, 3 Wend., 214; 32 Cal., 68; 5 Cranch C. C., 467; 2 Browne [Pa.], 325; 7 Iowa, 287; 51 Me., 395.)

(c) **Extent of impression and opinion.**—As to extent of disqualification when juror entertains an opinion or impression. (Laws 1873, ch. 475; *Stokes v. People*, 58 N. Y., 164.)

In other states.—A juror may be challenged for disqualification. (51 Ind., 14.) Objection must be made before indictment (2 Browne [Pa.], 325; 15 Cal., 320); and before it is received by the court. (9 Mass., 107; 2 Pick., 563.)

An amicus curiæ may object. (9 Mass., 107.) After indictment, objection that a juror was an alien cannot be taken. (2 Post, 100.) May be taken as a plea in abatement. (11 Ala., 57; 40 Ill., 268; 53 Ga., 73; 17 Ohio, 232; 30 id., 542.) A conscientious scruple is a ground for challenge. (1 Halst., 322; 2 Ind., 329; 2 Blackf., 427; 7 Yerg., 271.)

After judgment an allegation in the caption of the indictment that it was found by "a grand jury of good and lawful men" is to be deemed good, though not stating the number or names of the jurors.

§ 240. **Manner of taking and trying the challenges.**—Challenges to individual grand jurors may be oral, and must be entered upon the minutes, and tried by the court in the same manner as challenges in the case of a trial jury.

New. (See Code Civil Procedure, § 1180; Laws 1873, ch. 427, § 1; 9 R. S. [Edm.], 609.)

(a) **Juror may be sworn and examined.**—A challenged juror may be sworn as a witness. (*Pringle v. Huse*, 1 Cow., 432; *Mechanics and Farmers' Bank v. Smith*, 19 Johns., 115.)

(b) **What may be asked.**—But cannot be asked any question that tends to his infamy or disgrace. (Id., 121.)

(c) **Challenge, how tried.**—The provision that the challenge must be tried and determined by the court only is constitutional. (*Weston v. People*, 6 Hun., 140; *People v. Tweed*, 11 id., 195.) The decisions of the court are not subject to exception, and not reviewable here. (*People v. Mather*, 4 Wend., 229; *Costigan v. Ouyler*, 21 N. Y., 134; *Sanchez v. People*, 22 id., 147.)

§ 241. **Decision upon the challenge.**—The court must allow or disallow the challenge, and the clerk must enter its decision upon the minutes.

§ 242. **Effect of allowing a challenge to an individual grand juror.**—If a challenge to an individual grand juror be allowed for any of the causes mentioned in subdivisions one, two or three of section two hundred and thirty-nine, he must be forthwith discharged from the grand jury. If such challenge be allowed for any of the causes mentioned in subdivisions four,

five or six of section two hundred and thirty-nine, the juror challenged cannot be present at or take part in the consideration of the charge against the defendant who interposed the challenge, or in the deliberations of the grand jury thereon.

New.

§ 243. **Violation of last section.**—The grand jury must inform the court of a violation of the last section, and the same is punishable by the court as a contempt.

New.

§ 244. **Appointment of foreman.**—From the persons summoned to serve as grand jurors, and appearing, the court must appoint a foreman. The court must also appoint a foreman when a person already appointed is discharged or excused before the grand jury are dismissed.

3 R. S., 1018, § 26.

(a) **Foreman a creature of statute.**—The appointment of a foreman, in the absence of a mandatory statute, not essential. (1 Bish. Crim. Proc., § 861; *Com. v. Walters*, 6 Dana, 290.)

The statute in some states require the foreman's indorsement to the indictment or it is invalid. (*Gardner v. People*, 3 Scam., 83.)

(b) **Minutes need not show appointment of foreman.**—The appointment of foreman need not be entered on the minutes of the court if the indictment is indorsed by him. (6 Cal., 214.)

§ 245. **Oath of the foreman and the other grand jurors.** The following oath must be administered to the foreman of the grand jury: "You, as foreman of this grand jury, shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this state, your fellows' and your own you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave anyone unpresented through fear, favor, affection or reward, or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God."

New. The usual practice is to swear the foreman first and then the others. (*Brown v. State*, 5 Eng., 607; *Allen v. People*, 77 Ill., 484.)

§ 246. **Oath of the foreman and the other grand jurors.** The following oath must be immediately thereupon administered to the other grand jurors present: "The same oath which your

foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God."

New. The form of oath should be substantially followed. (5 Eng., 607, *supra*.)

§ 247. Oath of the foreman and the other grand jurors.

If, after the foreman and the grand jurors then present are sworn, any other grand juror appear, and be admitted as such, the oath, as prescribed in section two hundred and forty-five, must be administered to him, commencing, "You, as one of this grand jury," and so on, to the end.

New. One not present may be sworn afterwards. (11 Mass., 142; 5 Ga., 607.)

§ 248. Charge of the court. — The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must read to them the provisions of this Code, from section two hundred and fifty-two to section two hundred and sixty-seven, both inclusive, or give them a copy thereof, and must give them such information as it may deem proper, as to the nature of their duties, and any charges and crimes returned to the court, or likely to come before the grand jury. The court need not, however, charge them respecting violations of a particular statute.

New.

§ 249. Retirement of the grand jury. — The grand jury must then retire to a private room and inquire into the offenses cognizable by them.

New. (*State v. Cowan*, 1 Head, 280; 1 Bish. Cr. Proc., 868.)

§ 250. Appointment of a clerk, and his duties. — The grand jury must appoint one of their number as clerk, who is to preserve minutes of their proceedings (except of the votes of the individual members on a presentment or indictment), and of the evidence given before them.

8 R. S., 1019, § 30.

It is provided by the Revised Statutes that every grand jury may appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence taken before them, etc. (*People v. Baker*, 10 How., 567.)

The court may consider the evidence taken before the grand jury in determining the probable guilt of the prisoner on an application for bail. (*People v. Hylar*, 2 Park., 570; *People v. Dixon*, 8 Abb., 395; *People v. Naughton*, 33 How. 430.)

§ 251. **Discharge of the grand jury.**—The grand jury, on the completion of the business before them, must be discharged by the court; but whether the business be completed or not, they are discharged by the final adjournment of the court.

New.

§ 252. **Power of grand jury to inquire into crimes, etc.** The grand jury has power, and it is their duty, to inquire into all crimes committed or triable in the county, and to present them to the court.

New.

A grand jury has full power to make inquiry and to present, by indictment, all persons charged with crime. (*People v. Huyler*, 2 Park., 566; *French v. People*, 3 id., 114; *People v. Page*, Id., 600; *People v. Horton*, 4 id., 222; *People v. Heffernan*, 5 id., 898.)

§ 253. **Foreman may administer oaths.**—The foreman may administer an oath to any witness appearing before the grand jury.

3 R. S., 1019, § 29; 1 R. L., 525, § 27.

In other states.—The foreman must administer the oath to witnesses. (50 Ga., 585; 77 id., 484; 16 Conn., 457.)

§ 254. **Definition of an indictment.**—An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime.

New. (1 Bish. Crim. Proc., § 181; 4 Black. Com., 299; 1 Chitty Cr. L., 168; Coke Litt., 126.)

§ 255. **Evidence receivable before the grand jury.**—In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other evidence than:

1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence; or
2. The deposition of a witness, in the cases mentioned in the third subdivision of section eight.

New. (1 Bish. Crim. Proc., § 865; *U. S. v. Coolidge*, 2 Gales., 364; *State v. Barnes*, 7 Jones' N. C., 20; *U. S. v. Reed*, 2 Blatch., 435.)

§ 256. **Evidence receivable before the grand jury.**—The grand jury can receive none but legal evidence.

New. (1 Bish. Crim. Proc., § 865; *State v. Froiseth*, 16 Minn., 296; *Sparrenberger v. State*, 58 Ala., 481; *State v. Walcott*, 21 Conn., 272; *Duke v. State*, 20 Ohio St., 220.)

§ 257. Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced.—The grand jury is not bound to hear evidence submitted for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence, within their reach, will explain away the charge, they should order such evidence to be produced; and for that purpose may require the district attorney to issue process for the witnesses.

3 R. S., 1019, § 82; as to last clause, see 1 Bish. Crim. Proc., § 867.

§ 258. Degree of evidence, to warrant an indictment.—The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

New.

(a) **What evidence necessary.**—The testimony given before the grand jury, which is always *ex parte*, should be sufficient in degree to convict if unexplained. Upon less than this a bill should not be found. (*People v. Baker*, 10 How., 567; *People v. Hyler*, 2 Park., 570.)

§ 259. Grand jurors must declare their knowledge as to commission of a crime.—If a member of the grand jury know, or have reason to believe, that a crime has been committed, which is triable in the county, he must declare the same to his fellow jurors, who must thereupon investigate the same.

New.

(a) **May indict on their own knowledge.**—They may act on present offenses of public notoriety, and also such as are within their own knowledge. (67 Penn. St., 80; 76 id., 319.)

A grand jury may, of their own knowledge, indict a person committing perjury before them. (30 Mo., 368; *Reg. v. Russell*, Carr & M., 247; *State v. Hatfield*, 3 Head, 231; 1 Bish. Crim. Proc., § 866.)

§ 260. Grand jury must inquire as to persons imprisoned on criminal charges and not indicted; the condition of public prisons, and the misconduct of public officers.—The grand jury must inquire:

1. Into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted;
2. Into the condition and management of the public prisons in the county; and

3. Into the willful and corrupt misconduct in office of public officers of every description in the county.

New.

§ 261. Grand jury entitled to access to public prisons, and to examine public records. — They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records in the county.

New.

§ 262. When and from whom they may ask advice, and who may be present during their sessions. — The grand jury may, in any case, ask the advice of any judge of the court, or of the district attorney of the county.

3 R. S., 1019, § 82.

It is the duty of the district attorney to attend the grand jury and advise them. (*Anon.*, 7 Cow., 563; 1 Conn., 428.)

§ 263. When and from whom they may ask advice, and who may be present during their sessions. — Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and of issuing subpoenas or other process for witnesses.

Id., § 82; *contra*, *Anon.*, 7 Cow., 563.

Where an indictment is found without a preliminary examination, the district attorney may be compelled to furnish the accused with a list of the witnesses who testified before the grand jury, and to allow prisoner's counsel to examine the minutes taken before grand jury. (*People v. Naughton*, 38 How., 430.)

§ 264. When and from whom they may ask advice, and who may be present during their sessions. — The district attorney of the county must be allowed, at all times, to appear before the grand jury, at his request, for the purpose of giving information relative to any matter before them, but no district attorney, officer or other person, shall be present with the grand jury during the expression of their opinions, or the giving of their votes upon any matter.

Id., § 83.

In other states. — No persons allowed to be present except the members and witnesses actually under examination. (67 Penn. St., 80; 6 Phila., 167.) But the prisoner is entitled to be present and ask questions. (1 Conn., 428; 16 *id.*, 458.)

§ 265. Secrets of the grand jury to be kept. — Every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them.

Id., § 81. (*People v. Tynder*, 19 Cal., 539; 1 Bish. Crim. Proc., § 857.)

In other states. — Witnesses cannot take advantage of this obligation in a criminal prosecution against them. (81 Cal., 564; 7 Ire., 101.) They are not permitted to disclose the evidence taken before the grand jury. (48 Me., 11; 4 Gray, 535.) Nor disclose the vote on finding the indictment. (16 Conn., 467; 20 Mo., 238; 46 Iowa, 88; 89 *id.*, 818.)

Grand jurors being sworn to secrecy cannot generally be disclosed. (*People v. Hulbut*, 4 Den., 183.)

A grand juror may, however, be asked who was the prosecutor of a particular indictment. (*People v. Hulbut*, 4 Den., 183.)

§ 266. Grand jury, when bound to disclose the testimony of a witness. — A member of the grand jury may, however, be required by any court, to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

Id., § 81.

A grand juror may be examined on a prosecution for perjury to show that a witness has contradicted on a trial what he testified to before the grand jury. (*People v. Hulbut*, 4 Den., 183.) He may also be asked who was the prosecutor of a particular indictment. (*Id.*)

But a grand juror cannot be called to impeach the conduct of the jury as to show that an indictment was found on insufficient testimony. (*Id.*)

Upon the hearing of a motion to quash an indictment on the ground that twelve of the jurors did not concur, grand jurors may be asked as to whether or not twelve did concur. (*People v. Shattuck*, 6 Abb. N. C., 83.)

In other states. — A grand juror may be compelled to testify as to what a witness testified to, when necessary for the ends of justice. (58 N. H., 484; 2 Green. C. R., 346.)

They are competent witnesses to prove perjury committed before them. (81 Cal., 564; 11 Cush., 187; 1 Car. & K., 519; 2 Cranch. C. C., 76; 64 Me., 267; 12 Gray, 167; 106 Mass., 75; 16 Conn., 467; 8 Watts, 56; 25 Gratt., 931; 5 Blackf., 21; 4 Ind., 422; 43 *id.*, 284; 7 Ire., 96; 2 Hill [S. C.], 238; 20 Miss., 704.)

They cannot impeach their own verdict by affidavit. (1 Hawk., 344; 20 Mo., 338; 17 Minn., 241; 41 Iowa, 811.) Nor disclose the vote on finding the indictment. (16 Conn., 457; 20 Mo., 238; 46 Iowa, 88; 89 *id.*, 818.)

So also is the district attorney a competent witness to prove the perjury of a witness before the grand jury. (59 Ind., 384.) But he cannot testify to a fact that will tend to impeach the verdict. (13 Me., 82; 13 Vt., 485.)

§ 267. Grand juror not to be questioned for his conduct as such.—A grand juror cannot be questioned for anything he may say, or any vote he may give, in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

New.

(a) A charge against juror is a contempt.—To assert that the grand jury or one of its members whilst sitting, are incompetent to the discharge of their duty, is a contempt. (*Ex parte Van Hook*, 3 C. H. Rec., 84.)

The publication of defamatory matter concerning a grand juror, not impeaching his conduct or capacity as such, does not amount to a contempt. (*Ex parte Spooner*, 5 C. H. Rec., 109.)

TITLE V.

OF THE INDICTMENT.

CHAPTER I. Finding and presentation of the indictment.

- II. Form of the indictment.
- III. Amendment of the indictment.
- IV. Arraignment of the defendant.
- V. Setting aside the indictment.
- VI. Demurrer.

VII. *Plea.

VIII. Removal of the action before trial.

CHAPTER I.

FINDING AND PRESENTATION OF THE INDICTMENT.

SECTION 268. Indictment must be found by twelve grand jurors, and indorsed by foreman.

269. If not so found, depositions, etc., must be returned to the court, with dismissal indorsed.

270. Effect of dismissal.

271. Names of witnesses must be indorsed upon indictment.

272. Indictment must be presented in presence of the grand jury, and filed.

§ 268. Indictment must be found by twelve grand jurors and indorsed by foreman.—An indictment cannot be found without the concurrence of at least twelve grand jurors. When

so found it must be indorsed, "A true bill," and the indorsement must be signed by the foreman of the grand jury.

3 R. S., 1020, § 86.

(a) **Twelve must concur.** — The prisoner on his arraignment may move to quash on the ground that less than twelve of the grand jurors did not concur in the finding. (*People v. Shattuck*, 6 Abb. N. C., 33; *Dawson v. People*, 25 N. Y., 408.)

See, also, 1 Bish. Crim. Proc., § 697; 1 Chitty Crim. Law, 324; *State v. Horton*, 63 N. C., 595; *Esterlong v. State*, 35 Miss., 210.

(b) **Must be indorsed and signed.** — Must be indorsed and signed by the foreman. (1 Bish. Crim. Law, § 698; *McGuffie v. State*, 17 Ga., 497; *State v. Brown*, 31 Vt., 602; *Wall v. State*, 23 Ind., 150.)

(c) **Initials of foreman sufficient.** — Signature of foreman by his initials is adequate. (*State v. Taggart*, 38 Me., 298.)

It is immaterial on what part of the bill the foreman's signature appeared. (*State v. Hogan*, 31 Mo., 342.)

§ 269. **If not so found, depositions, etc., must be returned to the court, with dismissal indorsed.** — If twelve grand jurors do not concur in finding an indictment, the depositions (and statement, if any) transmitted to them, must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

Id.

(a) **How shown that twelve did not concur.** — The grand jurors may be examined as to whether or not twelve grand jurors concurred in the finding. (*People v. Shattuck*, 6 Abb. N. C., 33.)

Should return "not a true bill" or "not found." (1 Bush. Crim. Proc., § 697; *State v. Horton*, 63 N. C., 595; *Esterlong v. State*, 35 Miss., 210.)

§ 270. **Effect of dismissal.** — The dismissal of a charge does not, however, prevent its being again submitted to a grand jury as often as the court may so direct. But without such direction it cannot be again submitted.

New.

§ 271. **Names of witnesses must be indorsed upon indictment.** — When an indictment is found the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, as provided in section two hundred and fifty-five, must be indorsed upon the indictment before it is presented to the court. If not so indorsed, the court must, upon the application of the defendant, at any time before trial, direct

the names of such witnesses, as they appear upon the minutes of the grand jury, to be furnished to him forthwith.

New.

(a) **When prisoner will be furnished evidence.** — It is discretionary with the court to order prosecution to furnish prisoner the evidence used before the grand jury. (*Elighmy v. People*, 79 N. Y., 546.)

(b) **Must have list of witnesses furnished him.** — However, where an indictment is found without a preliminary examination, the accused is entitled to a list of the witnesses examined before the grand jury. (*People v. Naughton*, 38 How., 430; 7 Abb. [N. S.], 421.)

And the district attorney must permit prisoner's counsel to examine the minutes. (*Id.*)

§ 272. (Amended 1882.) **Indictment must be presented in presence of the grand jury and filed.** — An indictment, when found by the grand jury, as prescribed in section two hundred and sixty-eight, must be presented by their foreman in their presence to the court, and must be filed with the clerk, and remain in his office as a public record, but it must not be shown to any person other than a public officer, until the defendant has been arrested or has appeared.

§ R. S., 1020, § 88.

The statute requiring the filing of an indictment, is merely directory. (*Dawson v. People*, 25 N. Y., 399.)

CHAPTER II.

FORM OF THE INDIOTMENT.

SECTION 273. Forms of pleading heretofore existing, abolished.

274. First pleading for the people, is indictment.

275. Indictment, what to contain.

276. Form of indictment.

277. When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent proceedings.

278, 379. Indictment must charge but one crime and in one form, except where it may be committed by different means.

280. Statement as to time when crime was committed.

281. Statement as to person injured or intended to be injured.

282. Construction of words used in indictment.

283. Words used in a statute need not be strictly pursued.

284. Indictment when sufficient.

285. Indictment not sufficient for defect of form, not tending to prejudice defendant.

SECTION 286. Presumptions of law and matters of which judicial notice is taken, need not be stated.

287. Pleading a judgment or determination of, or proceeding before a court or officer of special jurisdiction.

288. Private statute, how pleaded.

289. Pleading in indictment for libel.

290. Pleading in indictment for forgery, where the instrument has been destroyed or withheld by defendant.

291. Pleading in indictment for perjury or subornation of perjury.

292. Upon indictment against several, one or more may be convicted or acquitted.

§ 273. Forms of pleading heretofore existing abolished.

All the forms of pleading in criminal actions, heretofore existing, are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

New.

§ 274. First pleading for the people, is indictment. —

The first pleading on the part of the people is the indictment.

New.

§ 275. Indictment, what to contain. — The indictment must contain :

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

2. A plain and concise statement of the act constituting the crime, without unnecessary repetition.

New. (1 Bish. Crim. Proc., §§ 77, 325.)

(a) **Indictment should follow statute. —** The indictment for a statutory offense should follow the precise words of the statute defining the offense. (*People v. Van Pelt*, 4 How., 38.)

(b) **But not in same words. —** An indictment for a statutory offense need not follow the very words of the statute. It is sufficient that the facts constituting the crime are well stated. (*Fraser v. People*, 54 Barb., 3: 6; *People v. Stockham*, 1 Park., 424; *Thompson v. People*, 3 id., 208; *People v. Allen*, 5 Den., 76; *People v. Walbridge*, 6 Cow., 512; *Tully v. People*, 67 N. Y., 15.)

An indictment for the murder of A. alias B., is not defective for uncertainty or duplicity. (*Kennedy v. People*, 39 N. Y., 245.)

An indictment for an assault and battery with intent to commit a felony, is sufficient if it charge the offense in the words of the statute. (*People v. Pettit*, 3 Johns., 511.)

The caption under former practice, constituted no part of the indictment. (*People v. Bennett*, 37 N. Y., 117.)

(c) **Must aver facts.** — An indictment is sufficient if it aver all the facts necessary to render the charge intelligible in its legal requisites, so as fully to inform the accused of the offense he is called upon to answer. (*Phelps v. People*, 6 Hun. 401; 72 N. Y., 334.)

(d) **Abbreviations allowed.** — The use of a common abbreviation in the matter of description which cannot mislead the defendant, will not vitiate. (*Patterson v. People*, 12 Hun, 187.)

§ 276. (Amended 1882.) **Form of indictment.** — The indictment should be signed by the district attorney, and may be substantially in the following form :

Court of oyer and terminer of the county of [stating the proper county]; or,

Court of oyer and terminer of the city and county of New York; or,

Court of sessions of the county of [stating the proper county]; or,

Court of general sessions of the city and county of New York; or,

City court of the city of [stating the proper city].

THE PEOPLE OF THE STATE OF NEW YORK }
against }
 A. B. }

The grand jury of the [here insert the name of the county, or of the city, or of the city and county, in which the indictment is found], by this indictment, accuse A. B. of the crime of [here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like, or if it be a misdemeanor, having no general name, such as libel, assault, or the like, insert a brief description of it, as it is given by statute], committed as follows :

The said A. B., on the day of , eighteen hundred and , at the town [or city or village, as the case may be] of in this county [here set forth the act charged as an offense].

A. B.,

District Attorney of the county of

New.

§ 277. **When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent**

proceedings.—If a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

New.

In other states the true name may be substituted for a fictitious one. (*Laure v. State*, 19 Ohio, 43; *State v. Burns*, 8 Nev., 251.)

§ 278. Indictment must charge but one crime and in one form, except where it may be committed by different means.—The indictment must charge but one crime and in one form, except as in the next section provided:

3 R. S., 1022, § 53.

(a) **Several distinct misdemeanors may be joined.**—*Held*, in cases of misdemeanor, several distinct offenses may be joined in one indictment. (*Kane v. People*, 8 Wend., 203.)

(b) **What sufficient allegation.**—In indictment charging that the defendant, on a certain day and divers other days and times, did sell by retail to divers persons, spirituous liquors, etc., to wit, three gills brandy, three gills rum, three gills of gin, etc., is good. It does not charge distinct offenses, so as to put the people to an election. (*Osgood v. People*, 39 N. Y., 449.)

§ 279. The crime may be charged in separate counts to have been committed by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts.

Id.

(a) **A count may charge the use of different means.**—A count charging the use of different prohibited means to commit a crime is good. (*People v. Davis*, 56 N. Y., 95.)

(b) **A single felony may be charged different ways.**—A single felony may be charged in different ways in several counts, so as to meet the facts of the case. (*Harris v. People*, 6 S. C., 206.)

(c) **One count may refer to another.**—The second count in an indictment may refer to the allegations contained in the first, without repeating them. (*People v. Graves*, 5 Park., 134.)

(d) **Court may compel election.**—The court has discretionary power to compel prosecution to elect one of several counts. (*Hawker v. People*, 75 N. Y. 487.)

(e) **Single crime charged differently.**—There may be a joinder of various counts stating the same offense distinctly and separately in various ways, so as to meet the evidence, and the court will not put the prosecutor to an election. (*Nelson v. People*, 5 Park., 39; 23 N. Y., 293; *Lonergan v. People*, 6 Park., 209; 50 Barb., 266.)

A count charging an assault "with intent to do bodily harm," and also "with intent to kill," is good. The words to do bodily harm are mere surplusages, unless there be added without "justifiable or excusable cause." (*Dawson v. People*, 25 N. Y., 399.)

(f) **What counts may be joined.**—A count for poisoning, which charges that the prisoner did administer, and did cause and procure to be administered, etc., is not bad for duplicity. (*Labeau v. People*, 6 Park., 371; 33 How., 66.)

Held, that counts for different offenses of the same grade and subject to the same punishment, may be joined. (*People v. Gates*, 13 Wend., 311.)

Held, also, that counts for embezzlement and larceny may be joined in same indictment. (*Coats v. People*, 4 Park., 662.)

(g) *Id.*—A count for counterfeiting silver coin may be joined with one for having possession of such coin with intent to utter it, though the punishment be different; but the prosecutor must elect. (*Queen's case*, 6 C. H. Rec., 63.)

(h) *Id.*—A count for forging a check may be joined with one for uttering and publishing it, etc. (*People v. Rynders*, 12 Wend., 425.)

(i) *Id.*—Two distinct offenses requiring different punishments cannot be alleged in the same count. (*Reed v. People*, 1 Park., 481.)

(j) **When judgment will be arrested.**—And if so included and a conviction follows, judgment will be arrested. (*People v. Wright*, 9 Wend., 198.)

(k) **Misdemeanors may be joined.**—Several distinct misdemeanors may be joined, and the prosecution cannot be put to an election. (*People v. Costello*, 1 Den., 83.)

A count for selling spirituous liquors without license to divers citizens and to persons unknown, only embraces one offense. (*People v. Adams*, 17 Wend., 475; *Hodgman v. People*, 4 Den., 235.)

(l) *Id.*—The joinder of several distinct misdemeanors is not ground for reversal on error, if the sentence be single and appropriate to either of the counts of the indictment. (*Polensky v. People*, 78 N. Y., 65.)

(m) **As to misdemeanor and felony.**—A misjoinder of counts charging a misdemeanor and a felony does not entitle the defendant to have the indictment quashed, except in the discretion of the court. (*People v. Court of Gen. Sess.*, 12 Hun, 395.)

(n) **Where counts refer to same transaction.**—Though an indictment in different counts charge what are technically distinct offenses, yet if it be apparent that each relates to the same transaction, it may be sustained. (*Taylor v. People*, 12 Hun, 312.)

(o) **When district attorney will elect.**—When but one and the same offense is charged in different counts, the district attorney must be put to an election. (*Armstrong v. People*, 70 N. Y., 88.)

(p) *Id.*—When an indictment contains a count for rape and one for an assault with intent to commit rape, the district attorney is not bound to elect between them. (*People v. Satterlee*, 5 Hun, 167.)

(q) *Id.*—When the ownership of property is variously charged in different counts, the district attorney must elect between them. (*Phelps v. People*, 6 Hun, 401.)

§ 280. Statement as to time when crime was committed.

The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime.

New.

The doctrine of the common law is that the time of the offense must always be alleged, but it is mere form, unless some special reason renders it imperative. (1 Bish. Crim. Proc., § 386; 1 Stark. Crim. Plead., 54; *Turner v. People*, 33 Mich., 363.)

The doctrine is general that where time is material it must, to the extent of such materiality, be alleged correctly and proved as laid. (1 Bish. Crim. Proc., § 399; *Dacy v. State*, 17 Ga., 439; *State v. Caverly*, 51 N. H., 446.)

(a) **What sufficient.**—An indictment is good if the day and year can be collected from the whole statement, though not specially averred. (*Gill v. People*, 3 Hun, 187; 5 S. C., 308, affirmed by court of appeals.)

(b) **Id.**—The time and place, when and where a crime was committed must be stated with certainty in the indictment, but it is not necessary to prove them as stated, unless they are necessary ingredients. (*People v. Stocking*, 50 Barb., 573; 32 How., 48; 6 Park., 263.)

§ 281. Statement as to person injured or intended to be injured.—When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

New.

An indictment for the murder of "A," alias "B.," is not void for uncertainty or duplicity. (*Kennedy v. People*, 39 N. Y., 245.)

§ 282. Construction of words used in indictment.—The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

New.

(a) **Sound sense will prevail.**—The doctrine is general that the court will consult sound sense to the disregard of captious objections, in determining the meaning of allegations in an indictment, and of two permissible constructions, it will adopt the one sustaining the proceedings. (1 Bish. Crim. Proc., § 356; *Com. v. Wents*, 1 Ashm., 269; *Rex v. Stevens*, 5 East, 344; *People v. Littlefield*, 5 Cal., 355.)

(b) **If intelligible the charge is sufficient.**—An indictment is sufficient if it aver all the facts necessary to render the charge intelligible. (*Phelps v. People*, 6 Hun, 401; 73 N. Y., 334.)

§ 283. Words used in a statute need not be strictly pursued.— Words used in a statute to define a crime need not be strictly pursued in the indictment; but other words, conveying the same meaning, may be used.

New.

(a) **Statute to be followed closely.**— An indictment for a statutory offense should follow the words of the statute as nearly as possible. (*People v. Van Pelt*, 4 How., 36.)

(b) **But not in same words.**— Need not, however, follow the very words of the statute. It is sufficient that the substantial facts constituting the crime are well stated. (*Fraser v. People*, 54 Barb., 306; *People v. Stockham*, 1 Park., 424; *Thompson v. People*, 8 id., 208.)

(c) **Equivalent words admissible.**— It is sufficient to use words of equivalent import and more extensive significance. (*Tully v. People*, 67 N. Y., 15.)

Must, however, state all the facts and circumstances which constitute the statutory offense. (*People v. Allen*, 5 Den., 76.)

(d) **Exception, how charged.**— An indictment for a statutory offense need not negative an exception in a proviso. If the defendant come within that provision he must show it. (*People v. Walbridge*, 6 Cow., 512.)

(e) **Contra formam statutorum.**— An indictment may be good at common law, notwithstanding a conclusion "*contra formam statutorum*." (*People v. Conger*, 1 Wh. C. C., 448; *Syracuse and Tully Plankroad Co.*, 66 Barb., 25.)

(f) **Id.**— Though two statutes be set forth in the indictment, it is not necessary to conclude "*contra formam statutorum*," where the offense is wholly created by one, and the other is merely amendatory, without affecting the offense. (*Kane v. People*, 8 Wend., 208.)

§ 284. Indictment, when sufficient.— The indictment is sufficient, if it can be understood therefrom :

1. That it is entitled in a court having authority to receive it though the name of the court be not accurately stated;

2. That it was found by a grand jury of the county, or if in a city court, of the city in which the court was held;

3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that it has been found impossible to discover his real name;

4. That the crime was committed at some place within the jurisdiction of the court; except where, as provided by sections one hundred and thirty-three to one hundred and thirty-eight, both inclusive, the act, though done without the local jurisdiction of the county, is triable therein;

5. That the crime was committed at some time prior to the finding of the indictment;

6. That the act or omission, charged as the crime, is plainly and concisely set forth;

7. That the act or omission, charged as the crime, is stated with such a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case.

3 R. S., 1622, § 54.

(a) **Common abbreviations allowed.** — The use of a common abbreviation will not vitiate an indictment. (*Patterson v. People*, 12 Hun, 137.)

(b) **A charge, if intelligent enough.** — An indictment is sufficient if it aver all the facts necessary to render the charge intelligible in its legal requisites, so as fully to inform the accused of the offense he is called upon to answer. (*Phelps v. People*, 6 Hun, 401; 72 N. Y., 334.)

(c) **Must be stated with certainty.** — The facts constituting the offense must be stated with as much certainty as the nature of the case will admit. (*Dord v. People*, 9 Barb., 671.)

(d) **Should be precise.** — The indictment must charge the offense with such precision as will enable the accused to judge whether the facts stated constitute an indictable offense. (*Biggs v. People*, 8 Barb., 547.)

(e) **Time and place.** — The time and place must be stated with certainty in the indictment, but it is not necessary to prove them as stated, unless they become material. (*People v. Stocking*, 50 Barb., 573; 82 How., 48; 6 Park., 263.)

(f) **Id.** — An indictment found in the county of H., charging that the prisoner, late of another county, did, at the town of F., etc., that being a town of the county of H., is sufficient; the court will take judicial notice that F. is in the county of H. (*People v. Breese*, 7 Cow., 429.)

(g) **Place essence of burglary.** — In an indictment for burglary the place is the essence of the offense; and if it be laid in a wrong ward the objection is fatal. (*Carny's case*, 3 C. H. Rec., 44.)

So, also, as to an indictment for keeping a disorderly house. (*McDonald's case*, Id., 128.)

(h) **Abortion, how charged.** — As to procuring abortion. (*See Orichton v. People*, 1 Keyes, 341; 1 Abb. Dec., 467; 6 Park., 363.)

(i) **Omissions easily supplied not fatal.** — Notwithstanding omissions an indictment will be considered good if the omissions complained of are, by common understanding, implied in that which is expressed. (*People v. Bennett*, 37 N. Y., 117; 4 Abb. [N. S.], 89.)

(j) **Acts forbidden on Sunday.** — Under the statute forbidding certain acts on Sunday, an indictment alleging that defendant on a specified day of the month, which day was on Sunday, did, etc., is sufficient after conviction, though such day was not Sunday. (*People v. Ball*, 43 Barb., 324.)

(k) **An impossible day.** — An indictment which lays the time of an indictment on an impossible day, is bad. (*John's case*, 5 C. H. Rec., 108.)

(l) **As to person known by different names.** — In an indictment against a person known by two or more names, and the pleader deems it necessary, for greater certainty, to aver both names, it is immaterial which is first stated, and which is the real name. (*Kennedy v. People*, 37 N. Y., 245; 5 Abb. [N. S.], 147.)

(m) **Necessary facts not covered by generalities.**—The omission of the averment of the necessary facts cannot be supplied by the words unjust, illegal, or pretended and extortionate. (*People v. Town Auditors*, 44 How., 233; 13 Abb. [N. S.], 43.)

(n) **Date of statute not vital.**—The misrecital of the date of a statute which has been repealed and re-enacted, will not vitiate an indictment. (*People v. Reed*, 47 Barb., 235.)

(o) **As to crime on Sunday.**—Though the doing of an act on Sunday may be the gist of the offense, the statement of the day is not more material than in other cases. (*People v. Ball*, 42 Barb., 324.)

(p) **Charge in libel must be explicit.**—An indictment for uttering, writing and publishing obscene, lewd and indecent paper in the form of a letter must at least describe the same in such terms as to give defendant sufficient information of the subject-matter of the charge. (*People v. Hallenbeck*, 53 How., 502; 2 Abb. N. C., 66.)

An indictment charging the killing whilst committing a burglary, also whilst committing a robbery, and also a killing with premeditation and deliberation, is good. (*Dolan v. People*, 6 Hun, 493; 64 N. Y., 485.)

In pleading proceedings of a justice of the peace, the indictment must state all the facts on which jurisdiction. (*People v. Weston*, 4 Barb., 226.)

(q) **Abduction.**—An indictment for abduction is sufficient, although it alleges the purpose of prostitution, concubinage and marriage, instead of stating it in the alternative, as in the statute. (*People v. Parshall*, 6 Park., 129.)

(r) **Abortion.**—Indictment, how construed with reference to procurement. (*Orrichon v. People*, 1 Keyes, 341; 6 Park., 363.)

An indictment charging the administering of drugs with intent to produce a miscarriage; and also averring that the death of the child was thereby produced, but omitting the allegation of intent to destroy, is defective as an indictment for manslaughter, but sufficient to convict for a misdemeanor. (*Lohman v. People*, 1 N. Y., 379.)

An indictment averring an intent to procure a miscarriage, etc., is sufficient. (*People v. Stockham*, 1 Park., 424.)

(s) **Administering poison.**—A count in an indictment which charges that the prisoner did administer and cause to be administered poison, etc., not bad for duplicity. (*Labeau v. People*, 33 How., 66; 34 N. Y., 223.)

(t) **Arson.**—Unlawfully, willfully and feloniously setting fire to a mill in the nighttime is equivalent to averring that it was willfully done. (*People v. Haynes*, 55 Barb., 450; 38 How., 369.)

Describing a building as a dwelling-house is sufficient, if usually occupied by lodgers at night, though not a dwelling-house. (*People v. Orcutt*, 1 Park., 252.)

What is sufficient definiteness as to the description of building. (*Hennessey v. People*, 21 How., 239.)

In an indictment, a variance between the indictment and proof as to ownership is fatal. (*McGarvey v. People*, 45 N. Y., 153; *People v. Gates*, 15 Wend., 159.)

An indictment against a tenant may properly describe the buildings as those of the owner. (*People v. Smith*, 3 How., 226.)

An indictment may describe the buildings burned as those of a tenant,

when they were in part occupied by him as a dwelling-house. (*Shepherd v. People*, 19 N. Y., 537.)

A tenant's tenure of interest in a dwelling-house is immaterial. (*People v. Van Blaricum*, 2 Johns., 105.)

What averment sufficient as to the ownership of goods burned. (*Dedien v. People*, 4 Park., 593 ; 17 How., 224.)

An indictment for burning one's own house with intent to defraud the insurance company, must allege that it was insured. (*People v. Henderson*, 1 Park., 560.)

Need not allege that the insuring company was a corporation, or had a right to make insurance. (6 Park., 114.)

Under an indictment for arson in first degree, conviction may be had in third degree. (*Freund v. People*, 5 Park., 198.)

An indictment for an attempt to commit arson, need not set out the manner of the attempt. (*Mackessey v. People*, 6 Park., 114.)

The words of the statute not being the subject of arson in the first degree used in defining arson of the second degree, how construed. (*People v. Durkin*, 5 Park., 243.)

In an indictment for arson in the third degree, it is not necessary to negative the exception in the statute, and to aver that the store or warehouse burned, was not within the cartilage of an inhabited dwelling-house. (*People v. Pierce*, 11 Hun. 683.)

(*u*) **Assault and battery** on an officer, how charged in an indictment. (*People v. Cooper*, 13 Wend., 379.)

How charged against an unknown person. (*White v. People*, 32 N. Y., 465 ; §§ 606, 607 ; *Noakes v. People*, 25 N. Y., 330.)

Must aver the intent in an indictment for assault with intent to kill. (*People v. Pellet*, 3 Johns., 511.)

Must also state the means used, as that it was with a "deadly weapon" or other such force as would be likely to produce death. (*People v. Davis*, 18 How., 134 ; 4 Park., 51 ; *O'Leary v. People*, Id., 187 ; 17 How., 816.)

(*v*) **Bawdy house.**—What is a sufficient charge in an indictment for keeping bawdy house. (*Harwood v. People*, 26 N. Y., 190 ; 16 Abb., 430.)

(*w*) **Bigamy.**—An indictment for bigamy must show that the accused was apprehended in the county where the indictment was found. (*Houser v. People*, 86 Barb., 83.)

The absence of such an averment is not a defect of form, but of substance. (*Id.*)

(*x*) **Burglary.**—An indictment for burglary must allege the breaking in of the statutory ways or it is defective. (*People v. Van Gaasbeck*, 9 Abb. [N. S.], 328 ; *Fellanger v. People*, 15 Abb., 128 ; 24 How., 841.)

Where a building is rented, an indictment may charge it as the dwelling-house of the tenant. (*People v. Bush*, 3 Park., 552.) In an indictment for burglary in the third degree, it is not necessary to allege that it was committed in the daytime. (*Buller v. People*, 4 Den., 68.) Need not specify what kind of felony was intended. (*Mason v. People*, 26 N. Y., 200.)

In an indictment for burglary in the first degree, the ownership of the dwelling house may be laid in a firm if the facts warrant it. (*Quinn v. People*, 71 N. Y., 561.)

(y) **Circulating foreign bank notes.**—It is necessary to allege that defendants committed the offense as officers of a bank, or that they received the bills at a greater rate of discount than the law allowed on State banks. (*People v. Williams*, 4 Park., 249.)

(z) **Conspiracy.**—An indictment must either show that the object aimed at or the means used are criminal. (*Lambert v. People*, 9 Cow., 578; *People v. Eckford*, 7 id., 535; *People v. Mather*, 4 Wend., 229; *Elkin v. People*, 28 N. Y., 177; 24 How., 272.)

An indictment for conspiring to cheat and defraud, *held* sufficient without averring the means to be used or that the conspiracy was unlawful. (*Schultz's case*, 5 C. H. Rec., 112; see, also, *March v. People*, 7 Barb., 391.)

An indictment for conspiracy to cheat by false pretenses must state the place at which the alleged pretenses were made. (*People v. Barrett*, 1 Johns., 66.)

One or more overt acts must be alleged in the indictment. (2 R. S., 735, § 17)

Where the conspiracy is to induce a witness to suppress her evidence, the indictment must aver that the conspirators did persuade and induce her to withdraw herself from the county, etc. (*People v. Chase*, 16 Barb., 495.)

Indictment may charge a prisoner with conspiring with others unknown. (*People v. Mather*, 4 Wend., 229.)

(1) **Crime against nature.**—That defendant *had* a venereal disease, need not necessarily be alleged in an indictment against nature. (*Lambertson v. People*, 5 Park., 200.)

An indictment for feloniously disintering the body of B., need not allege she was a human being; that fact will be assumed. (*People v. Graves*, 5 Park., 134.)

(2) **Disorderly house.**—What necessary. (*People v. Cary*, 4 Park., 238.)

(3) **Embezzlement.**—A single count in an indictment may charge the embezzlement of goods under and over twenty-five dollars in value. (*Coats v. People*, 4 Park., 662.)

An indictment must charge that defendant received the goods as clerk or servant of the owner. (*People v. Allen*, 5 Den., 76; see, also, *Larkin v. People*, 61 Barb., 226.)

An indictment for embezzlement need not state the particular kind of money taken, but must allege the value thereof. (*Bork v. People*, 16 Hun, 476.)

(4) **False pretenses.**—In an indictment for obtaining goods by false pretenses it is not necessary to negative all the pretenses used. (*People v. Stone*, 9 Wend., 182; *Skiff v. People*, 2 Park., 139; *People v. Gates*, 13 id., 311; *Thomas v. People*, 34 N. Y., 351.) What is a sufficient specification of the pretenses and denial of their truth. (*Conger's case*, 4 C. H. Rec., 65; 1 Wh. C. C., 448.)

(5) **Their intent and effect.**—(*Clark v. People*, 2 Lans., 329; *People v. Dalton*, 2 Wh. C. C., 161; *Skiff v. People*, 2 Park., 139; *People v. Krummer*, 4 id., 217; *Smith v. People*, 47 N. Y., 303.)

The goods must be described. (*Conger's case*, 4 C. H. Rec., 65.) To what extent. (*Skiff v. People*, 2 Park., 139.)

Need not specify all the property obtained. (*People v. Parish*, 4 Den., 153.)

Nor any particular value. (*People v. Stetson*, 4 Barb., 151.)

(6) **Obtaining signature, etc.**—(*Fenton v. People*, 4 Hill, 126; *People v. Crissie*, 4 Den., 525.) Obtaining indorsement, etc. (*People v. Chapman*, 4 Park., 56.)

Obtaining conveyance, etc. (*Dord v. People*, 9 Barb., 671.)

Obtaining signature by means of false writing. (*People v. Gates*, 13 Wend., 811.)

Requisites of an indictment for obtaining money under false pretenses. (*People v. Higbie*, 66 Barb., 131.)

In an indictment for obtaining money under false pretenses representing that the party was free from debt, the specific items of indebtedness must be averred or no evidence thereof is admissible. (*Barber v. People*, 17 Hun, 366.)

Requisites of an indictment for cheating by false weights and measures. (*People v. Fisk*, 1 Sheld., 537.)

(7) **Forgery.** — What a sufficient averment of intent. (*People v. Stearns*, 21 Wend., 409; *Paige v. People*, 6 Park., 684.)

On an indictment drawn in the name of a copartnership firm or a banking-house it is not necessary to set out the names of all the copartners. (*Harris v. People*, 9 Barb., 664; *People v. Curling*, 1 Johns., 320.)

Sufficient to describe the party intended to be defrauded, with reasonable certainty. (*Noakes v. People*, 25 N. Y., 880; *People v. Graham*, 6 Park., 185.)

An indictment charging the forging of a mortgage must state that the party whose name is forged owns the land described in the mortgage. (*People v. Wright*, 9 Wend., 193.)

Sufficiency in the description of a corporation in an indictment for forgery. (*People v. Graham*, 1 Sheld., 151.)

What is sufficient description of instrument. (*People v. Gremaer*, 9 Wend., 272; *Holmes v. People*, 15 Abb., 154; *Vincent v. People*, 15 Abb., 234; 5 Park., 88; *Tomlinson v. People*, 5 Park., 813; *Wilson v. People*, 5 Park., 178; *People v. Clement*, 26 N. Y., 193.)

Forging a bill of exchange. Not necessary to insert letters or marks appearing on the margin of bill. (*People v. Franklin*, 3 Johns. Cas., 299.)

(8) **Lost instrument.** — Where the forged instrument is lost or destroyed, or was last traced to the possession of the accused, an exact description is not required in the indictment. The reason of the omission must be stated in the indictment, and then such an account of it given as shall fairly apprise the prisoner of the offense charged. (*People v. Kingsley*, 2 Cow., 522; *People v. Badgley*, 16 Wend., 68; 3 Mass., 83.)

A count charging a prisoner with forging two distinct instruments is bad, if different degrees of punishment is required. (*People v. Wright*, 9 Wend., 193.)

(9) **Fraud.** — The names of the persons defrauded, or that they are unknown to the grand jury, must be stated in an indictment for fraud. (*People v. Fish*, 4 Park., 206.)

In an indictment for girdling fruit trees, averment of possession is sufficient. (*People v. Hors*, 7 Barb., 9.)

(10) **Homicide.** — In an indictment for homicide, where deceased was called by acquaintances by a name different from his true name, the true name may be stated, and if the true name be proved on the trial there is no variance, although it also appear that deceased also went by another name. (*People v. Walter*, 32 N. Y., 147; 18 Abb., 147.)

Uncertainty in an indictment as to time, not necessarily material. (*Reynolds v. People*, 17 Abb., 413.)

(11) **Larceny.**—An indictment for stealing bank bills is good. (*Low v. People*, 2 Park., 37; see, also, *People v. Loop*, 3 Park., 599.)

What is a sufficient description of money stolen. (*Haskins v. People*, 16 N. Y., 344.)

A hog, though killed and partly dressed, may be described in an indictment for larceny as a hog. (*Reed's case*, 2 C. H. Rec., 168.)

Cloth cut out for a pair of trousers, and described in an indictment as an unmade pair of trousers, held sufficient. (*Moon's case*, 3 C. H. Rec., 92.)

Goods taken from a receiptor after having been taken by a sheriff, should be laid in the officer. The receiptor has no property therein. (*Norton v. People*, 8 Cow., 137; *Palmer v. People*, 10 Wend., 165.)

Property stolen from a county poor-house may be described as the property of the county. (*People v. Bennett*, 4 Abb. [N. S.] 89; 87 N. Y., 117.)

Where several parties own the property, how described. (*Ridgway's case*, 1 C. H. Rec., 3; *Williams' case*, Id., 29; *Van Riper's case*, 2 id., 45; *Wynes' case*, 3 id., 192; *Dizon's case*, 4 id., 142; *Veitch's case*, 5 id., 4; *Bartron's case*, 6 id., 56.)

Written instruments, how described. (*People v. Holbrook*, 13 Johns., 90.)

Held, that a count for larceny and one for receiving stolen goods may be joined in the same indictment. (*People v. Bruno*, 6 Park., 657.)

(12) **Lotteries.**—An indictment should contain a particular description of the lottery. (*People v. Taylor*, 8 Den., 91, 99; *Garland's case*, 6 C. H. Rec., 98.)

Indictment for publishing an account of an illegal lottery should contain what. (*Charles v. People*, 1 N. Y., 180; 8 Den., 212; *People v. Warner*, 4 Barb., 314.)

Since all lotteries are now declared unlawful, it is not necessary to declare that the lottery is one not authorized by law. (*People v. Sturdevant*, 28 Wend., 418.)

Where an indictment charged the selling of a piece of paper commonly known as and called a lottery policy, held sufficient. (*People v. Borges*, 6 Abb., 132.)

An indictment for selling lottery policies, the "particulars whereof are unknown," and to "divers persons unknown," is sufficient. (*Pickett v. People*, 8 Hun, 83; 67 N. Y., 609.)

(13) **Misdemeanor.**—On an indictment for a felony, the prisoner may be convicted of a mere misdemeanor if facts enough are averred to make out a misdemeanor. (*People v. Jackson*, 3 Hill, 92.)

Mere surplusage in an indictment will not vitiate. (*Lohman v. People*, 1 N. Y., 379; 2 Barb., 216.)

Requisites for an indictment for a misdemeanor of a prohibited act, the punishment of which is not otherwise provided for. (*People v. Bogart*, 8 Park., 143; 3 Abb., 198.)

Several misdemeanors may be joined in the same indictment. (*People v. Costello*, 1 Den., 83; *Kane v. People*, 8 Wend., 203.)

An indictment for the violation of an order of the board of health must allege that the order was published before the alleged violation. (*Reed v. People*, 1 Park., 481.)

(14) **Murder.**—The provisions of the Revised Statutes do not make it necessary to charge the common-law requisites of the indictment. (*People v. Brock*, 13 Wend., 159.)

An indictment which alleges that the prisoner willfully, maliciously and of malice aforethought shot, etc., is a sufficient averment of intent. (*Fitzgerald v. People*, 37 N. Y., 413; 4 Abb. [N. S.], 68; 49 Barb., 122.)

Means used and nature of the wound, how set forth. (*Sanchez v. People*, 22 N. Y., 147; 4 Park., 535; *People v. Sanchez*, 18 How., 72; *Shay v. People*, 22 N. Y., 317; *People v. Shea*, 10 Abb., 413; 18 How., 538; 4 Park., 353.)

An indictment may properly charge that the injury and death were produced by a weapon unknown. (*Colt v. People*, 1 Park., 611.)

Upon an indictment containing a single count for murder, drawn as required by the common law, a verdict of murder in the second degree is legal. (*Keefe v. People*, 7 Abb. [N. S.], 76; 40 N. Y., 348.)

So held in the absence of an exception on that point. (*People v. Thompson*, 41 N. Y., 1.)

(15) **Negligence.**—An indictment against a railroad company for neglect to maintain a fence, etc., should aver the duty to maintain, etc. (*People v. N. Y. C. R. R.*, 5 Park., 195.)

(16) **Nuisance.**—An indictment for nuisance in maintaining a dam on a private stream, must show in what way such dam became a nuisance. (*People v. Townsend*, 3 Hill, 479.)

Gunpowder.—An indictment for negligently keeping gunpowder stored near a dwelling-house must allege it to have been negligently kept. (*People v. Sands*, 1 Johns., 78.)

Against a plankroad company. (*People v. Branchport and Penn Yan Plankroad Co.*, 5 Park., 604.)

(17) **Offenses against a corporation.**—(*People v. Wilber*, 4 Park., 19.)

(18) **Official misconduct** against officers of a turnpike company. (*Kane v. People*, 3 Wend., 203; 3 id., 363.)

Commissioners of highways. (*People v. Adair*, 2 Hill, 619.)

Against an attorney for buying a promissory note, need not aver that it was bought with intent to prosecute it, or that it had been prosecuted. (*People v. Walbridge*, 6 Cow., 512.)

Against bank officers. (*People v. Williams*, 1 Seld., 563.)

Against an attorney for extorting more than legal fees, etc. (*People v. Rust*, 1 Cai., 131.)

Against a justice of the peace. (*People v. Coon*, 15 Wend., 277.)

Against constable, for not executing warrant, etc. (*People v. Weston*, 1 Seld., 555.)

(19) **Perjury.**—Jurisdiction, etc. (*People v. Phelps*, 5 Wend., 9; *People v. Warner*, Id., 271; *Burns v. People*, 59 Barb., 531.)

The particular mode of administering the oath need not be alleged. Sufficient to allege that it was administered by a magistrate in due form of law. (*Tuttle v. People*, 36 N. Y., 431.)

At an election, etc. (*Campbell v. People*, 8 Wend., 636.)

In making a false oath to a written complaint. (*People v. Robertson*, 3 Wh. C. C., 180.)

The language of the false oath need not be set forth with literal accuracy. (*People v. Warner*, 5 Wend., 271; *Tomlinson's case*, 4 C. H. Rec., 125.)

The substantial facts are sufficient. (*Tuttle v. People*, 36 N. Y., 431.)

Indictment for perjury committed by an insolvent in making false inventory. (*People v. Phelps*, 5 Wend., 9.)

Only the material and false parts of an oath need be set forth. (*Campbell v. People*, 8 Wend, 636 ; *Burns v. People*, 59 Barb., 531.)

Materiality of false evidence need not be specially averred. It is sufficient if the materiality appears on the face of the indictment. (*Campbell & Guston v. People*, 4 Lans., 487 ; 61 Barb., 35.)

An indictment for subornation of perjury should contain all the facts necessary to show that the false swearing was legally perjury. (*Elkin v. People*, 28 N. Y., 177 ; 24 How., 272.)

Sufficiency of an indictment for perjury in an indictment based on false affidavit, under the act of 1870. (*Ortner v. People*, 4 Hun, 823 ; 6 S. C., 548.)

(20) **Receiving stolen goods.** — Knowledge and intent must be averred. (*People v. Johnson*, 1 Park., 564 ; *Chatterton v. People*, 15 Abb., 147.)

Goods feloniously received, whether any consideration passed or not, are within the statute. (*Hopkins v. People*, 12 Wend., 76.)

Need not describe or name the thief. (*People v. Caswell*, 21 Wend., 86.)

For receiving embezzled goods, need not aver that the embezzler was the clerk or servant of the owner. (*People v. Stein*, 1 Park., 202.)

For receiving stolen goods taken from a corporation, the existence of the corporation must be averred. (*Cohen v. People*, 5 Park., 830.)

(21) **Robbery.** — Where bank bills are taken, description unnecessary if substance of the offense is set out. (*Quinlan v. People*, 6 Park., 9.)

For taking United States treasury notes. (*People v. Jones*, 5 Lans., 340.)

(22) **Second offenses.** — First offense must be set up, where an increased punishment is presented for a second. (*People v. Youngs*, 1 Cai., 37.)

A simple averment that the prisoner was convicted, etc., is sufficient. (*Stevens v. People*, 1 Hill, 261.)

What is sufficient indictment. (*Gibson v. People*, 5 Hun, 542.) Jurisdiction of the court where the conviction was had must be properly alleged. (*People v. Powers*, 6 N. Y., 60 ; *People v. Cook*, 2 Park., 121 ; *People v. Golden*, 3 id., 330.)

(23) **Seduction.** — Averment of mutual promises of marriage not necessary in an indictment for seduction. (*Crosier v. People*, 1 Park., 453.)

(24) **Selling false passage tickets.** — What to aver in indictment. (*Enright v. People*, 21 How., 383.)

Selling liquors without license. Where the indictment names various kinds and quantities sold, it will be regarded as a single offense. (*People v. Adams*, 17 Wend., 475 ; *Hodgman v. People*, 4 Den., 235.)

An indictment for selling liquors on June first and on divers other days, held good. (*People v. Adams*, 17 Wend., 475.)

Alleging several sales to divers persons unknown, is not a charge of more than one offense. (*Osgood v. People*, 39 N. Y., 449.)

Requisites of an indictment for selling liquors without license, considered. (*People v. Hodgman*, 4 Den., 235 ; *People v. Townsey*, 5 id., 70 ; *People v. Glickerson*, 4 Park., 26 ; *People v. Brown*, 6 Park., 666.)

(25) **Selling unwholesome food.** — Indictment must charge that the provisions were designed for consumption as food, etc. (*Goodrich v. People*, 19 N. Y., 574.)

(26) **Treason.** — An indictment for treason in giving aid, etc., to the enemies of the United States, quashed because it charged the offense to have

been committed against the people of the State of New York. (*People v. Lynch*, 11 Johns., 549.)

(27) **Trespass** in cutting wood, etc. What must be alleged. (*People v. Carpenger*, 5 Park., 228.)

(28) **Illegal voting.**—What facts must be alleged. (*People v. Standish*, 6 Park., 111; *Hamilton v. People*, 57 Barb., 625.)

(29) **Contra formam statuti.**—(*People v. Walbridge*, 6 Cow., 512; *Kane v. People*, 8 Wend., 208; 8 id., 868; *People v. Cook*, 2 Park., 12; *Hughes' case*, 4 C. H. Rec., 132; *Syracuse and Tully Plankroad Co. v. People*, 66 Barb., 25.)

§ 285. Indictment not insufficient for defect of form, not tending to prejudice defendant.—No indictment is insufficient nor can the trial, judgment, or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits.

8 R. S., 1022, § 54.

(a) **Defects of form not fatal.**—In an indictment it is only defects in the form which do not affect the substantial right of the prisoner, that are cured by verdict. (*Fellinger v. People*, 15 Abb., 128; *People v. Fellinger*, 24 How., 341; *Briggs v. People*, 8 Barb., 547; *Sanchez v. People*, 22 N. Y., 150.)

(b) **Id.**—A conviction will not be reversed on error for a formal defect in the indictment in no way prejudicial to the prisoner. (*Schrumpf v. People*, 5 Hun, 542.)

(c) **Joinder of several misdemeanors not fatal.**—The joinder of several distinct misdemeanors is not a ground for reversal on error if the sentence be single and appropriate to either of the counts of the indictment. (*Polinsky v. People*, 73 N. Y., 65.)

§ 286. Presumptions of law and matters of which judicial notice is taken, need not be stated.—Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment.

New.

(a) **Indictment should state facts only.**—It is sufficient to state the facts and leave the court to draw the inferences and apply the law. (1 Blash. Crim. Pro., § 515; 1 Chitty Crim. L., 231a; *Ree v. Michael*, 2 Leach [8th ed.], 983, 941.)

(b) **When court will take judicial notice.**—An indictment found in the county of "H." charging that the prisoner, late of another county, did at the town of "F.," etc., that being a town of the county of "H.," is sufficient. The court will take judicial notice that "F." is in the county of "H." (*People v. Breeze*, 7 Cow., 429.)

(c) **Objections to pleading, when taken.**—Under this provision it is too late to object to argumentative pleading after verdict; if the necessary facts

appear it is sufficient. (*People v. Warner*, 4 Barb., 314; *People v. Rynders*, 12 Wend., 425; *People v. Badgley*, 16 id., 53; *Charles v. People*, 1 N. Y., 180.)

An indictment charging the felonious making of a certain check, selling out a copy without averring that it was in writing is good. (*People v. Rynders*, 12 Wend., 425.)

Neither presumptions of law or matters of which judicial notice will be taken, need state in an indictment. (Penal Code of California, § 961; 56 Ind., 107; 110 Mass., 181; 3 Cranch C. C., 618.)

§ 287. Pleading a judgment or determination of, or proceeding before, a court or officer of special jurisdiction.—In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction, however, must be established on the trial.

New. (See *Elghmy v. People*, 79 N. Y., 546.)

§ 288. Private statute, how pleaded.—In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute, by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

New. This section charges the common law rule. (2 Hall P. C., 172; 2 Hawk's Ch., 25, § 108; Bacon's Abridg., p. 2.) An indictment on a private statute must be set out in full. (7 Conn., 93; 1 Dev. & B., 115; 1 Sid., 356.)

§ 289. Pleading in indictment for libel.—An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application of the party libeled, of the defamatory matter on which the indictment is founded; but it is sufficient to state generally, that the same was published concerning him; and the fact that it was so published, must be established on the trial.

New. (1 Bish. Crim. Pro., § 787.) The indictment must set forth matter which is *prima facie* libelous, or must charge that matters set out, although not a libel on its face, was designed to be. (6 Iredell, 418.)

The charge need not be more specific than the libelous publication. (3 Humph., 389.) Charging that the defendant sent the libel is a sufficient publication. (32 Me., 530.)

An indictment which alleges that defendant published a libel tending to blacken the honesty, etc., of the said A. B., and thereby expose him to public ridicule and contempt, sufficiently charges that the libel was concerning A. B. (4 Ga., 14.)

§ 290. **Pleading in indictment for forgery, where the instrument has been destroyed, or withheld by defendant.** — When an instrument, which is the subject of an indictment for forgery, has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment, and established on the trial, the misdescription of the instrument is immaterial.

New.

On an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth the substance of it, averring the loss or destruction. (*People v. Badgley*, 16 Wend., 53; *People v. Kingsley*, 2 Cow., 522.)

Requisites of such an indictment. (*Id.*)

(a) **In other states.** — Where the document is lost or destroyed, or remains in defendant's hands, it is sufficient to aver special facts as an excuse for not setting it out. (36 Cal., 245; 11 Cush., 142.) Giving the purport of the instrument as nearly as possible. (50 Ala., 139; 27 Ill., 45; 55 Ind., 599; 2 Mason, 468; 34 Me., 223; 4 Leigh., 694; 69 N. C., 313; 4 Car. & P., 254.)

A conviction will be sustained, notwithstanding a variance. (*People v. Badgley*, 16 Wend., 531.)

§ 291. **Pleading in indictment for perjury or subornation of perjury.** — In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person where or before whom the perjury was committed.

New in form.

(a) **Form of oath immaterial.** — In an indictment for perjury it is unnecessary to set forth the form in which the oath was administered. (*Tuttle v. People*, 36 N. Y., 431.)

(b) **Facts sufficient.** — Sufficient to allege the specific facts which constitute the crime; evidence need not be set forth. (*Id.*)

(c) **Time not material.** — In an indictment for perjury the time is not material. (*People v. Hoag*, 2 Park., 9.)

(d) **Must show materiality and place.** — An indictment for perjury, which does not show where the crime was committed, or aver that the false

swearing was in a matter material to the issue, is fatally defective. (*Gelson v. People*, 4 Lans., 487; 61 Barb., 35.)

(e) **Must show in what court.**—An indictment for perjury must set forth the court in which the suit was pending, and must charge the offense to have been committed in the proper county. (*Geston v. People*, 4 Lans., 487; 61 Barb., 55.)

(f) **Before inspectors of election.**—Requisites of an indictment for perjury before inspectors of election. (*Burns v. People*, 5 Lans., 189; *Campbell v. People*, 8 Wend., 636.)

(g) **Must show materiality.**—Also materiality of the evidence alleged to be false must be alleged. (See *O'Reilly v. People*, 9 Abb. N. C., 77; S. C. Ct. App., 12 Week. Dig., 571.)

(h) **Before fire marshal.**—Requisites of an indictment charging false swearing before a fire marshal. (*Harris v. People*, 4 Hun, 1.)

(i) **In an affidavit.**—In an indictment for perjury on an affidavit to a claim against a city, it was not averred that the affidavit was authorized by the charter, or that it was made for the purpose required thereby, or that the claim to which it was appended was ever presented to the common council for audit. *Held*, fatally defective. (*Ortner v. People*, 4 Hun, 323.)

(j) **On naturalization papers.**—Form of an indictment for perjury alleged to have been committed in a proceeding to obtain naturalization of an alien in a county court. (*People v. Sweetman*, 3 Park., 358.)

(k) **Before justice of peace.**—Also in a civil action tried before a justice of the peace. (*People v. McKinney*, 3 Park., 510.)

(l) **By an insolvent.**—In an indictment for perjury committed in the taking of an oath by an insolvent on presenting his petition for discharge, need not set forth more than the substance of the oath. (*People v. Warner*, 5 Wend., 272.)

§ 292. Upon indictment against several, one or more may be convicted or acquitted.—Upon an indictment against several defendants any one or more may be convicted or acquitted.

New.

(a) **In other states.**—Convictions of codefendants are several. (32 Mass., 406.) Charge against them is several as well as joint. (2 Ire., 402; 49 Vt., 437.) So one may be found guilty and another acquitted. (8 Cush., 523.) When two are charged with an offense, it is not a variance that the proof goes only against one. (21 Pick., 523; 105 Mass., 586; 107 id., 208.) When jointly convicted, they should be sentenced severally. (16 Ark., 37; 3 Wis., 785.)

(b) **Quashing as to one.**—However, quashing an indictment as to one of several defendants, quashes it as to all. (*People v. Eckford*, 7 Cow., 585; *Lambert v. People*, Id., 166.)

(c) **Persons jointly indicted, how convicted.**—Though two or more persons jointly indicted cannot be convicted of a joint offense, when their offenses are proved to have been separate, yet they may be convicted of their separate offenses as if separate indictments had been found. (*Chatterton v. People*, 15 Abb., 147.)

(d) *Id.*—If the acts of the prisoners committing the offense are a part of one and the same transaction, and the offense in law admits of different degrees, they may be convicted of different degrees, though jointly indicted for the same offense. (*Klein v. People*, 31 N. Y., 229.)

(e) *Id.*—Where two are jointly indicted for committing a larceny, and one pleads guilty to an attempt to commit larceny and is sentenced, the other defendant may be lawfully tried for the larceny and on conviction, be sentenced to suffer the penalty of the law therefor. (*Id.*)

(f) *When entitled to separate trials.*—Two or more persons jointly indicted for forging bank paper, etc., are not entitled to separate trials as matter of right. (*Shaw and Haskin's case*, 1 C. H. Rec., 177.)

(g) *Id.*, in capital cases.—*Seem*, as to whether two persons indicted for a capital offense and entitled to a peremptory challenge, can be tried together against their consent. (*People v. Howell*, 9 Johns., 296.)

(h) *Name of one omitted by mistake.*—Where two persons are jointly indicted for larceny, and the name of one has been omitted by mistake from the body of the indictment, *held*, that the jury could acquit the party not named and convict the other or pass no verdict in case of the first, except to return the fact to the court. (*Van Orden and Stewart's cases*, 1 C. H. Rec., 64.)

CHAPTER III.

AMENDMENT OF THE INDICTMENT.

SECTION 293. When amendment allowed.

294. Trial to proceed.

295. Effect of verdict, etc.

§ 293. **When amendment allowed.**—Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable.

New. (See 3 R. S., 1022, § 54.)

(a) *At common law and in other states.*—There are many English statutes of amendments and jeofails which having been passed before the settlement of this country are common law with us; but by their terms they do not extend to criminal causes. (3 Black. Com., 407; 4 *id.*, 375; *Atcheson v. Everitt*, Cowp., 383, 392; 1 Bish. Crim. Pro., § 707; 1 Stark. Crim. Pl. [2d ed.], 259; *Com. v. Morse*, 2 Mass., 128; *Com. v. Child*, 13 Pick., 198.) A material

amendment to an indictment would clearly be unconstitutional. (*Starlup v. State*, 10 Vroom, 423, 432; *Calvin v. State*, 25 Texas, 789.)

(b) **Changing of name allowed.**—The mere formal changing of a name allowed. (*Haywood v. State*, 47 Miss., 1; *Rough v. Com.*, 28 Smith [Pa.], 495; *State v. Manning*, 14 Texas, 402; 1 Bish. Crim. Pro., § 97 *et seq.*)

(c) **When indictment set aside or amended.**—Whether an indictment can be set aside or amended on motion for having been found without evidence, or on that which was insufficient, *quære*. (*People v. Hulbut*, 4 Den., 133.)

§ 294. **Trial to proceed.**—After such amendment, the trial, whenever the same shall be proceeded with, shall proceed in the same manner and with the same consequences, as if no such variance had occurred.

New.

§ 295. **Effect of verdict, etc.**—A verdict and judgment, which shall be given after the making of any such amendment, shall be of the same force and effect, as if the indictment had originally been found in its amended form.

New.

CHAPTER IV.

ARRAIGNMENT OF THE DEFENDANT.

SECTION 296. Defendant must be arraigned in the court in which indictment is found, if triable therein, or if not, in that to which it is sent or removed.

297. If indictment be for felony, defendant must be present; if for misdemeanor, he may appear by counsel.

298. When personal appearance is necessary, if defendant be in custody, he must be brought before the court.

299. If discharged on bail or deposit, bench warrant to issue.

300. Bench warrant, by whom and how issued.

301. Form of bench warrant.

302. Direction in bench warrant, if indictment be for misdemeanor.

303. If offense be bailable, order for bail to be indorsed on bench warrant.

304. Bench warrant, how served.

305. Proceedings on bench warrant, when defendant is brought before magistrate of another county.

306. Ordering defendant into custody, or increasing bail, when indictment is for felony.

307. Defendant, if present, to be committed; if not, bench warrant to issue.

308. Defendant appearing for arraignment without counsel, to be informed of his right to counsel.

SECTION 309. Arraignment, how made.

310. If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.

311. Time allowed defendant to answer indictment.

312. How defendant may answer indictment.

§ 296. (Amended 1882.) **Defendant must be arraigned in the court in which indictment is found, if triable therein, or if not, in that to which it is sent or removed.** — When an indictment is filed, the defendant must be arraigned thereon, before the court in which it is found, or before the court to which it is sent or removed.

New.

Arrangement defined. (1 Bish. Crim. Proc., § 928; 4 Bl. Comm., 321, 332; *Whitehead v. Com.*, 19 Gratt., 640; *Jackson v. Com.*, Id., 656.)

The arraignment and plea are a necessary part of the proceedings, and that without them there can be no valid trial and judgment. (*Early v. State*, 1 Texas App., 248; *Holden v. State*, 1 Texas App., 225; *State v. Barnes*, 59 Mo., 154; *Graeter v. State*, 54 Ind., 159; *Gregg v. People*, 81 Mich., 471; 1 Bish. Crim. Proc., § 733; 28 Cal., 330.)

The failure of this duty is fatal. (53 Cal., 480; 54 Ind., 159; 81 Mich., 471.)

(a) **No particular form necessary.** — Any form of arraignment is sufficient by which the prisoner admits his identity and demands a trial. (*People v. Frost*, 5 Park., 52.)

(b) **Court of sessions cannot arraign a murderer.** — A prisoner indicted for murder cannot be arraigned in the court of sessions. (*People v. McCraney*, 21 How., 149.)

§ 297. (Amended 1882.) **If indictment be for felony, defendant must be present; if for misdemeanor, he may appear by counsel.** — If an indictment be for a felony, the defendant must be personally present when arraigned; but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel.

New.

§ 298. **When personal appearance is necessary, if defendant be in custody, he must be brought before the court.** — When his personal appearance is necessary, if he be in custody, the court may direct the officer in whose custody he is, to bring him before it to be arraigned.

New.

§ 299. (Amended 1882.) **If discharged on bail or deposit, bench warrant to issue.** — If the defendant have been discharged on bail, or have deposited money instead thereof, and do

not appear to be arraigned, or if the defendant be for any cause absent when his personal attendance is necessary, the court, in addition to the forfeiture of any undertaking of bail, or of any money deposited, may direct the clerk to issue a bench warrant for his arrest.

New.

§ 300. (Amended 1882.) **Bench warrant, by whom, and how issued.**—The clerk, on the application of the district attorney, may accordingly at any time after the order, whether the court be sitting or not, issue a bench warrant to one or more counties. A bench warrant for the arrest of any defendant indicted may also be issued by the district attorney at any time after the indictment is found.

Laws 1847, ch. 888 ; 3 R. S., 1022, § 57.

§ 301. (Amended 1882.) **Form of bench warrant.**—The bench warrant issued upon the indictment must, if the crime be a felony, be substantially in the following form :

“County of Albany [or as the case may be].

“In the name of the people of the state of New York :

To any peace officer in this state. An indictment having been found on the day of , eighteen hundred and , in the court of sessions of the county of Albany [or as the case may be], charging C. D. with the crime of [designating it generally].

“You are therefore commanded, forthwith to arrest the above-named C. D., and bring him before that court [or if the indictment have been sent or removed to another court], before the court of oyer and terminer of that county [or as the case may be] to answer the indictment ; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of Albany [or, as the case may be, or in the city or county of New York, to the keeper of the city prison of the city of New York].

City [or town] of , the day of , eighteen hundred and

“By order of the court.

E. F., *Clerk*, or

G. H., *District Attorney of the county*
of ”

New.

§ 302. **Direction in bench warrant if indictment be for misdemeanor.** — If the crime be a misdemeanor, the bench warrant must be in a similar form, adding to the body thereof a direction to the following effect: "Or if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment."

New.

§ 303. **If offense be bailable, order for bail to be indorsed on bench warrant.** — If the crime charged be bailable, the court, upon directing the bench warrant to issue, may fix the amount of bail; and in such case an indorsement must be made upon the bench warrant and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of dollars."

New.

§ 304. **Bench warrant, how served.** — The bench warrant may be served in any county, in the same manner as a warrant of arrest, except, that when served in another county, it need not be indorsed by a magistrate of that county.

3 R. S., 1023, § 58; Laws 1847, ch. 338; Laws 1830, ch. 320, § 62.

§ 305. **Proceedings on bench warrant when defendant is brought before magistrate of another county.** — If the defendant be brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto, in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings may be had thereon, as provided in sections one hundred and fifty-nine to one hundred and sixty-one, both inclusive.

New. (See, also, cases cited under §§ 159, 161, *ante*.)

§ 306. **Ordering defendant into custody, or increasing bail, when indictment is for felony.** — If the defendant, before the finding of an indictment, has given bail for his appearance to answer the charge, the court, to which the indictment is presented or sent or removed for trial, may order the defendant to be committed to actual custody, either without bail, or unless he give bail in an increased amount, to be specified in the order.

New.

§ 307. **Defendant, if present, to be committed; if not, bench warrant to issue.** — If the defendant be present when the order is made, he must be forthwith committed accordingly. If he be not present, a bench warrant must be issued and proceeded upon, in the manner provided in this chapter.

New.

§ 308. **Defendant appearing for arraignment without counsel, to be informed of his right to counsel.** — If the defendant appear for arraignment, without counsel, he must be asked if he desire the aid of counsel, and if he does, the court must assign counsel.

New.

§ 309. **Arraignment, how made.** — The arraignment must be made by the court, or by the clerk or district attorney, under its direction, and consists in stating the charge in the indictment to the defendant, and in asking him whether he pleads guilty or not guilty thereto. If the defendant demand it, the indictment must be read, or a copy thereof furnished to him before requiring him to plead.

3 R. S., 1024, § 74; see notes under § 296, *ante*.

(a) **No certain form required.** — Any form of arraignment is sufficient by which the prisoner admits his identity and demands a trial. (*People v. Frost*, 5 Park, 52.)

(b) **Murderer cannot be arraigned in court of sessions.** — A prisoner indicted for murder cannot be arraigned in the court of sessions. (*People v. McCraney*, 21 How., 149.)

§ 310. **If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.** — If when arraigned the defendant allege that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment; and the subsequent proceedings on the indictment may be had against him, by that name, referring also to the name by which he is indicted.

New.

(a) **Misnomer, when available.** — Under a plea of not guilty, the defendant cannot avail himself of a misnomer. (*People v. Smith*, 1 Park., 329.)

(b) **Id.** — A defendant cannot have the proceedings in an action against him set aside on motion, on account of his being misnamed therein; his remedy is by plea in abatement. (*Miller v. Slettiner*, 7 Bos., 672; 22 How., 518.)

(c) *Alias dictus*.—If a defendant be truly named, the addition of an "*alias dictus*" is not a ground for a plea in abatement. (*Reid v. Lord*, 4 Johns., 118.)

§ 311. **Time allowed defendant to answer indictment.**—If, on the arraignment, the defendant require it, he must be allowed until the next day, or such further time may be allowed him as the court deems reasonable, to answer the indictment.

New.

§ 312. **How defendant may answer indictment.**—In answer to the indictment, the defendant may either move the court to set the same aside, or may demur or plead thereto.

New.

Irregular organization of grand jury.—A plea in abatement that the grand jury was irregularly organized cannot be introduced by the defendant. (*People v. Dolan*, 6 Hun, 232 ; *Id.*, 493 ; 64 N. Y., 485.)

CHAPTER V.

SETTING ASIDE THE INDICTMENT.

SECTION 313. Indictment, when set aside on motion.

314. Defendant, when precluded from objecting to indictment in any other manner.

315. Motion, when heard.

316. If denied, defendant must immediately demur or plead.

317. If granted, defendant discharged, unless the case be submitted to the same or another grand jury.

318. Effect of order for re-submission.

319. When new indictment not found.

320. Order to set aside indictment, no bar to another prosecution.

§ 313. **Indictment, when set aside on motion.**—The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases :

1. When it is not found, indorsed and presented as prescribed in sections two hundred and sixty-eight and two hundred and seventy-two ;

2. When a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in sec-

tions two hundred and sixty-two, two hundred and sixty-three and two hundred and sixty-four.

New.

See cases cited under §§ 268, 272, 262, 263, 264, *ante*.

§ 314. **Defendant, when precluded from objecting to indictment in any other manner.**—If the motion to set aside the indictment be not made, the defendant is precluded from afterward taking the objections mentioned in the last section.

New.

(a) **Motion to quash, when taken.**—The court will not ordinarily quash an indictment, though defective, after the defendant has been arraigned and pleaded not guilty. (*People v. Walters*, 5 Park., 661.)

(b) **Id.**—An objection to the manner of presenting an indictment by the grand jury must be taken on the trial or prior thereto. (*Brotherton v. People*, 75 N. Y., 159.)

§ 315. **Motion, when heard.**—The motion to set aside an indictment must be heard at the time of the arraignment, unless, for good cause, the court postpone the hearing to another time.

New.

§ 316. **If denied, defendant must immediately demur or plead.**—If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

New.

§ 317. **If granted, defendant discharged, unless the case be submitted to the same or another grand jury.**—If the motion be granted, the court must order that the defendant, if in custody, be discharged therefrom, or if under bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury.

New.

§ 318. **Effect of order for re-submission.**—If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money have been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

New.

§ 319. **When new indictment not found.**— Unless a new indictment be found, before the next grand jury of the county or city is discharged, the court must, on the discharge of such grand jury, make the order prescribed by section three hundred and seventeen.

New.

§ 320. **Order to set aside indictment no bar to another prosecution.**— An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense.

New.

An arrest of judgment after conviction is not a bar to a second indictment in a case of felony. (*People v. Casborus*, 13 Johns., 351.)

CHAPTER VI.

DEMURRER.

SECTION 321. Only pleading for defendant, is demurrer or plea.

322. Demurrer or plea, when put in.

323. Grounds of demurrer.

324. Demurrer, how put in, and its form.

325. When heard.

326. Judgment on demurrer.

327. If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury.

328. If re-submission not ordered, defendant discharged.

329. Proceedings, if re-submission ordered,

330. If demurrer disallowed, defendant may be permitted to plead; when he must do so, and effect of his omission.

331. When objections, forming ground of demurrer, may be taken at the trial, or in arrest of judgment.

§ 321. **Only pleading for defendant, is demurrer or plea.**— The only pleading on the part of the defendant is either a demurrer or a plea.

New. (1 Bish. Crim. Proc., § 775.)

§ 322. **Demurrer or plea, when put in.**— Both the demurrer and the plea must be put in, either at the time of the arraignment.

ment, or at such other time as may be allowed to the defendant for that purpose.

New. (1 Bish. Crim. Proc., § 775.)

323. Grounds of demurrer.—The defendant may demur to the indictment, when it appears upon the face thereof :

1. That the grand jury, by which it was found, had no legal authority to inquire into the crime charged, by reason of its not being within the local jurisdiction of the county ; or

2. That the indictment does not conform substantially to the requirements of sections two hundred and seventy-five and two hundred and seventy-six ; or

3. That more than one crime is charged in the indictment within the meaning of sections two hundred and seventy-eight or two hundred and seventy-nine ; or

4. That the facts stated do not constitute a crime ; or

5. That the indictment contains matter, which, if true, would constitute a legal justification or excuse for the acts charged, or other legal bar to the prosecution.

New. (1 Bish. Crim. Proc., § 775, *et seq.*)

(a) **Effect of joining several misdemeanors.**—The joining of several distinct misdemeanors is not ground for reversal on error, if the sentence be single and appropriate to either of the counts of the indictment. (*Polinsky v. People*, 73 N. Y., 65.)

(b) **Effect of misjoinder of counts.**—A misjoinder of counts charging a misdemeanor and a felony does not entitle the defendant to have the indictment quashed, except in the discretion of the court. (*People v. Court of Gen. Sess.*, 13 Hun, 895.)

(c) **Sameness of transaction in different counts.**—Though an indictment in different counts charge what are technically distinct offenses, yet if it be apparent that each relates to the same transaction it may be sustained. (*Taylor v. People*, 12 Hun, 212.)

(d) **When district attorney must elect.**—Where but one and the same offense is charged in different counts, the district attorney cannot be put to an election. (*Armstrong v. People*, 70 N. Y., 88.)

(e) **Several misdemeanors may be joined.**—Several misdemeanors may be joined in the same indictment. (*People v. Costello*, 1 Den., 83 ; *Kane v. People*, 8 Wend., 203.)

(f) **Effect of former acquittal.**—A former acquittal, though upon a defective indictment, may be pleaded in bar. (*Croft v. People*, 15 Hun, 484.)

(g) **Id.** An acquittal on the merits of the offense of forging an order in writing is pleadable in bar to a subsequent prosecution for obtaining money on the false pretense that the instrument was true. (*People v. Krummer*, 1 Sheld., 549.)

(h) **When district attorney not required to elect.**—Where an indictment contains a count for rape and one for an assault with intent to commit a rape, the district attorney is not bound to elect between them. (*People v. Satterlee*, 5 Hun, 167.)

(i) **When prisoner need not be present in court.**—On a motion to quash, it is not necessary that defendant be present in court during the argument. (*People v. Vail*, 57 How., 81; 6 Abb. N. C., 206.)

See also cases cited under §§ 275, 276, 278, 279, *ante*.

§ 324. **Demurrer, how put in, and its form.**—The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it may be disregarded.

New.

§ 325. **When heard.**—Upon the demurrer being filed, the objections presented thereby must be heard at such time as the court may appoint.

New.

§ 326. **Judgment on demurrer.**—The court must give judgment upon the demurrer, either allowing or disallowing it; and an order to that effect must be entered upon the minutes.

New.

(a) **Judgment on demurrer not reviewable before judgment.**—A decision overruling a demurrer interposed to an indictment and directing that judgment be given to the people unless the accused plead over, cannot be reviewed upon a *certiorari* before a judgment has been entered on the decision. (*People v. Beman*, 22 Hun, 288.)

(b) **Even if both parties agree to it.**—The court cannot review the decision before the entry of judgment, even though counsel for both parties agree to it. (*Id.*)

(c) **How reviewed.**—In a criminal case prosecuted by indictment, if judgment be entered on a demurrer, the judgment may be reviewed upon a writ of error. (*People v. Reagle*, 60 Barb., 527, 548.)

(d) **Cannot be reviewed before judgment.**—There is no authority at common law or under the statute for reviewing a decision of the oyer and terminer overruling a demurrer upon a *certiorari* before judgment. (*People v. Beman*, 22 Hun, 284; *People v. Walter*, 68 N. Y., 409.)

§ 327. **If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury.**—If the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless

the court, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, direct the case to be re-submitted to the same or another grand jury.

New.

§ 328. **If re-submission not ordered, defendant discharged.**— If the court do not direct the case to be re-submitted the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he have deposited money instead of bail, the money must be refunded to him.

New. (See §§ 817, 818, *ante*.)

§ 329. **Proceedings, if re-submission ordered.**— If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections three hundred and eighteen and three hundred and nineteen.

New.

§ 330. **If demurrer disallowed, defendant may be permitted to plead; when he must do so, and effect of his omission.**— If the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow. If he do not plead, judgment must be pronounced against him, if the crime charged is a misdemeanor, otherwise a plea of "not guilty" must be entered.

New.

§ 331. **When objections, forming ground of demurrer, may be taken at the trial or in arrest of judgment.**— The objections mentioned in section three hundred and twenty-three can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty, and in arrest of judgment.

New.

CHAPTER VII.

PLEA.

SECTION 332. The different kinds of pleas.

333. Plea, how put in.

334. Its form.

335. Plea of guilty, how put in.

336. Plea of insanity.

337. Plea may be withdrawn by permission of the court.

338. What is denied by a plea of not guilty.

339. What may be given in evidence under it.

340, 341. What is deemed a former acquittal.

342. If defendant refuse to answer indictment, plea of not guilty to be entered.

§ 332. **The different kinds of pleas.**— There are three kinds of pleas to an indictment; a plea of

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the crime charged; which may be pleaded either with or without the plea of not guilty.

New.

(a) **Evidence of former conviction.**— A former trial and conviction cannot be given in evidence under the plea of not guilty. (*People v. Benjamin*, 2 Park., 201.)

(b) **Effect of former indictment.**— The pendency of a former indictment for the same offense upon which defendant has been arraigned and to which he has pleaded, cannot be pleaded in abatement. (*People v. Fisher*, 14 Wend., 9.)

(c) **Plea of not guilty and special pleas.**— After a prisoner has pleaded not guilty, it is in the discretion of the court to permit him to interpose a special plea setting up defects in the organization of the grand jury. (*People v. Allen*, 43 N. Y., 28.)

(d) **Former conviction without judgment enough.**— The plea of former conviction is supported by proof of a lawful trial and verdict, though no judgment be given upon it. (*Shepherd v. People*, 25 N. Y., 406; *People v. Cramer*, 5 Park., 171.)

(e) **What is a valid acquittal.**— A verdict upon which no judgment could have been given, cannot be pleaded as a former acquittal. (*People v. Olcott*, 2 Johns. Cases, 301.)

(f) **Id.**— A defendant convicted and afterwards discharged, because a juror has been improperly withdrawn, if again indicted for the same offense, cannot plead a former acquittal, if the first indictment was insufficient. (*People v. Barrett*, 1 Johns., 66.)

(g) **Must be put in jeopardy.**—To sustain a plea of former acquittal, it must appear that the defendant was put in jeopardy by the former trial. (*Canter v. People*, 1 Abb. Dec., 805.)

(h) **Second indictment for stealing same goods.**—A verdict of acquittal for stealing the same goods which were charged in the former indictment as the property of another owner cannot be pleaded in bar. (*Hughes' case*, 4 C. H. Rec., 132.)

(i) **Conviction for petit larceny.**—A conviction for petit larceny before a court of special sessions cannot be pleaded in bar of a subsequent indictment for burglary arising out of the same act. (*People v. McCloskey*, 5 Park., 57.)

(j) **Acquittal not always a bar.**—Where one offense is committed the more effectually to carry into effect another, an acquittal of the latter is no bar to an indictment for the former. (*People v. Ward*, 15 Wend., 231.)

(k) **Same act and intent necessary.**—To sustain a plea of former acquittal, there must not only be the same act, but also the same intent. (*People v. Warren*, 1 Park., 338.)

(l) **Robbery and larceny.**—A trial and acquittal for robbery may be pleaded in bar to an indictment for the larceny of the same property. (*People v. McGowan*, 17 Wend., 386.)

(m) **Former acquittal in forgery.**—On the trial of uttering a note with a forged indorsement, the record of a former acquittal on the charge of forging the indorsement is a good defense. (*People v. Allen*, 1 Park., 445.)

(n) **In counterfeiting.**—Where the defendant had in his possession at the same time several counterfeit bank notes, a trial and acquittal on an indictment for having one of such notes in his possession with intent to utter it, may be pleaded in bar to a subsequent indictment for having other such notes in his possession with like intent. (*People v. Van Keuren*, 5 Park., 66.)

(o) **Forgery and false pretenses.**—An acquittal on the merits of forging an order in writing is pleadable in bar to a subsequent prosecution for obtaining money on the false pretense that the instrument was true. (*People v. Krummer*, 1 Sheld., 549; 4 Park., 217.)

(p) **Rape and assault and battery.**—To an indictment for rape, the defendant cannot plead in bar a former conviction for assault and battery arising out of the same transaction. (*People v. Saunders*, 4 Park., 196.)

(q) **Nuisance.**—An acquittal on a former indictment for nuisance is not a bar to a second prosecution, where the erection is not a nuisance *per se*. (*People v. Townsend*, 3 Hill, 479.)

(r) **No new trial after acquittal for felony.**—A new trial cannot be granted where the defendant has been acquitted of a felony. (*People v. Comstock*, 8 Wend., 549.)

(s) **After acquittal, no writ of error.**—After a judgment for the defendant in a criminal case, a writ of error will not lie at the suit of the people. (*People v. Corning*, 2 N. Y., 9.)

(t) **Effect of pronouncing a wrong judgment.**—A prisoner upon whom a wrong judgment has been pronounced, upon a regular trial and conviction, cannot be subjected to another trial. (*Shepherd v. People*, 25 N. Y., 406; reversing 23 How., 337; *O'Leary v. People*, 4 Park., 187.)

(u) **Court may correct the record.**—The court may remit the record, with directions to pronounce the proper judgment. (*Hussy v. People*, 47 Barb., 503.)

(v) **New trial may be had after reversal of conviction.**—After the reversal of a conviction on a writ of error sued out by the defendant, a new trial may be ordered for the same offense. (*People v. Ruloff*, 5 Park, 77.)

(w) **Withdrawing juror, when not allowed.**—After a trial has begun, the judge has no power to withdraw a juror on the motion of the district attorney, merely because he is not prepared with his evidence, without the prisoner's consent. (*People v. Barrett*, 2 Cai., 304; *Grant v. People*, 4 Park., 527; *Klock v. People*, 2 Park., 676.)

(x) **Prisoner to be again tried after disagreement of jury.**—Where a jury is unable, after great deliberation, to agree, they may be discharged and the prisoner be retried by another jury. (*People v. Goodwin*, 18 Johns., 187; *Hauzhurst's case*, 2 C. H. Rec., 33; *People v. Ward*, 1 Wh. Crim. C., 469.)

(y) **Effect of jury's separating.**—When a jury in a criminal case separate without authority, and without having agreed upon a verdict, they may be discharged; and such discharge is not a bar to a second trial for the same offense. (*People v. Reagle*, 60 Barb., 527.)

(z) **Effect of arrest of judgment.**—An arrest of judgment after conviction for a felony is not a bar to a second indictment for the same offense. (*People v. Casborus*, 13 Johns., 351; *People v. McKay*, 18 id., 212.)

(1) **When not put in jeopardy.**—A prisoner is not put in jeopardy when the evidence fails to establish the particular offense charged in the indictment. (*Canter v. People*, 1 Abb. Dec., 305.)

(2) **Effect of repealing law.**—Where a prisoner is convicted of murder, and subsequently the existing law inflicting punishment is repealed without any saving clause, and he has a final adjudication in his favor that the substituted law is *ex post facto*, it is equivalent to an acquittal. (*Hartung v. People*, 28 N. Y., 167; 28 id., 400; reversing 23 How., 814.)

(3) **Plea to the jurisdiction and decision thereon.**—A decision on a plea to the jurisdiction is not a trial on the merits, and does not place the defendant in jeopardy. (*Gardiner v. People*, 6 Park., 155.)

(4) **Acquittal on defective indictment.**—A former acquittal, though on a defective indictment, may be pleaded in bar; in the absence of proof to the contrary, it will be presumed to have been upon the merits. (*Croft v. People*, 15 Hun, 484.)

§ 333. **Plea, how put in.**—Every plea must be oral, and must be entered upon the minutes of the court.

New.

§ 334. **Its form.**—The plea must be entered in substantially the following form:

1. If the defendant plead guilty to the crime charged in the indictment, "the defendant pleads that he is guilty;"
2. If he plead guilty to any lesser crime than that charged in

the indictment, "the defendant pleads guilty to the crime of" — (naming it).

3. If he pleads not guilty, "the defendant pleads not guilty."

4. If he plead a former conviction or acquittal: "The defendant pleads, that he has already been convicted (or acquitted, as the case may be), of the crime charged in this indictment, by the judgment of the court of — (naming it), rendered at — (naming the place), on the — day of —."

New.

§ 335. **Plea of guilty, how put in.**— A plea of guilty can only be put in by the defendant himself in open court, except upon an indictment against a corporation, in which case it may be put in by counsel.

New in form. (See 1 Bush. Crim. Proc., § 794a.)

§ 336. **Plea of insanity.**— Whenever a person in confinement under indictment desires to offer the plea of insanity, he may present such plea at the time of his arraignment, as a specification under the plea of not guilty.

New.

(a) **Reasonable doubt.**— The prisoner is entitled to the benefit of any reasonable doubt as to his sanity. (*Brotherton v. People*, 75 N. Y., 159; *People v. McCann*, 16 N. Y., 70.)

(b) **Presumption of sanity.**— The presumption is in favor of sanity, but if the prisoner gives any evidence tending to overthrow that presumption then the prosecution must satisfy the jury beyond a reasonable doubt that the prisoner is sane. (*People v. O'Connell*, 25 Alb. L. J., 42 [Ct. of App.] .)

§ 337. **Plea may be withdrawn by permission of the court.**— The court may, in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.

New.

§ 338. **What is denied by a plea of not guilty.**— The plea of not guilty is a denial of every material allegation in the indictment.

New. (See § 331, *ante*.)

Former conviction cannot be given under a plea of not guilty. (*People v. Benjamin*, 2 Park., 201.)

§ 339. **What may be given in evidence under it.**— All matters of fact, tending to establish a defense, other than that

specified in the third subdivision of section three hundred and thirty-two, may be given in evidence under the plea of not guilty.

• New.

§ 340. **What is deemed a former acquittal.**—If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment were dismissed upon an objection to its form or substance, without a judgment of acquittal, it is not deemed an acquittal of the same offense.

3 R. S., 1024, § 74 ; 1 Bush. Crim. Proc., § 484a.

(a) **Variance.**—An acquittal on the ground of variance between the indictment and proof is not sufficient where the variance consisted in a failure to establish the particular offense charged. (*Canter v. People*, 1 Abb. Dec., 305.)

§ 341. **What is deemed a former acquittal.**—When, however, the defendant was acquitted on the merits, he is deemed acquitted of the same offense, notwithstanding a defect in form or substance in the indictment on which he was acquitted.

Id.

(a) **Must have been put in jeopardy.**—It must appear that the defendant was put in jeopardy by the former trial. (*Canter v. People*, 1 Abb. Dec., 305 ; see *People v. Barrett*, 1 Johns., 66.)

(b) **Effect of acquittal on a defective indictment.**—A former acquittal, though upon a defective indictment, may be pleaded in bar. In the absence of proof to the contrary, it will be presumed to have been upon the merits. (*Croft v. People*, 15 Hun, 484.)

§ 342. **If defendant refuse to answer indictment, plea of not guilty to be entered.**—If the defendant refuse to answer an indictment by demurrer or plea, a plea of not guilty must be entered.

Id.

CHAPTER VIII.

REMOVAL OF THE ACTION, BEFORE TRIAL.

SECTION 343. Existing writs and proceedings, to remove indictment before trial abolished.

344. When, and in what case, indictment may be removed before trial.

345. If former trial were had, indictment may be removed before the new trial.

346. Application for removal, how made.

347. Stay of trial, how obtained, to enable defendant to apply for removal.

348. Decision on application for stay, to be indorsed on papers and filed.

349. If application for stay be denied, no other application can be made.

350. Violation of last section a misdemeanor and contempt, and order of removal to be vacated.

351. Order of removal to be filed, and pleadings and proceedings to be transmitted.

352. Proceedings on removal, if defendant be in custody.

353. Order for removal must be filed, before a juror is sworn. Authority of the court to which indictment is removed.

§ 343. **Existing writs and proceedings, to remove indictment before trial abolished.**—All writs and other proceedings heretofore existing, for the removal, upon the application of the defendant, of criminal actions prosecuted by indictment, from one court to another before trial, are abolished.

New.

§ 344. **When, and in what cases, indictment may be removed before trial.**—A criminal action, prosecuted by indictment, may, at any time before trial, on the application of the defendant, be removed from the court in which it is pending, as provided in this chapter, in the following cases:

1. From a court of sessions or a city court, to the court of oyer and terminer of the same county, for good cause shown;

2. From a court of oyer and terminer or sessions, or a city court to the court of oyer and terminer of another county, on the ground that a fair and impartial trial cannot be had in the county or city where the indictment is pending.

3 R. S., 229, § 29; Laws 1859, § 31; 3 R. S., 1026, § 87.

The oyer and terminer have power to receive back from the general sessions

and try indictments found in the oyer and terminer and sent to the general sessions. (*People v. Gay*, 10 Wend., 509.)

Heretofore held that the oyer and terminer, in their discretion, could remit back to the general sessions an indictment found in the sessions, and removed by order of a circuit judge. (*People v. N. Y. Gen. Sessions*, 3 Barb., 144.)

It is the duty of the New York court of sessions to send to the oyer and terminer all indictments for offenses which they cannot try. (*People v. Shepherd*, 11 Abb., 59; 19 How., 446.)

The New York general sessions will not transfer to the oyer and terminer indictments found in the sessions except on motions, and on notice to the district attorney. (*McFarland's case*, 7 Abb. [N. S.], 348.)

§ 345. If former trial were had, indictment may be removed before the new trial.—If one or more trials be had, and a new trial is necessary, either by reason of the discharge of a jury without a verdict, or of the granting of a new trial, the removal may be allowed at any time before the new trial.

3 R. S., 229, § 29.

§ 346. Application for removal, how made.—The application for the order of removal must be made to the supreme court, at a special term in the district, upon notice of at least ten days to the district attorney of the county where the indictment is pending, with a copy of the affidavits or other papers on which the application is founded.

3 R. S., 1026, §§ 87, 88.

(a) **When indictment must be tried at circuit.**—When an indictment has been removed into the supreme court, it must be tried at the circuit and not at the oyer and terminer. (*People v. Ruloff*, 3 Park., 401.)

(b) **How place of trial may be effected.**—A change in the place of trial can only be had by a proper suggestion on the roll or by leave of the court. (*People v. Mather*, 3 Wend., 431.)

(c) **How the venire is arranged.**—The venue is never changed in a criminal case, but a venire may be awarded to the sheriff of another county on a suggestion that an impartial trial cannot be had. (*People v. Vermilyea*, 7 Cow., 108; *People v. Webb*, 1 Hill, 179.)

This must be shown by fact; simple belief not enough. (*Id.*)

(d) **Facts and circumstances must be set forth.**—The venue will not be changed in a criminal case upon an affidavit of the prisoner's belief that a fair and impartial trial cannot be had where the indictment was found; the facts and circumstances must be set forth. (*People v. Bodine*, 7 Hill, 147.)

(e) **When fair trial cannot be had.**—That a fair and impartial trial, by any means within the reach of the law, cannot be had in the county in which the venue is laid, is a sufficient reason for changing the place of trial. It is not indispensable that there should have been an ineffectual attempt to obtain a jury in that county. (*People v. Long Island R. R. Co.*, 4 Park., 602; 16 How., 106.)

(f) **Prisoner must make a clear case.**—The prisoner is not entitled to a change of the place of trial, unless he make a clear case that by reason of popular passion or prejudice he cannot have an impartial trial in the county where the venue is laid; the particular facts and circumstances must be stated in the affidavits. (*People v. Sammis*, 3 Hun, 560.)

(g) **Convenience of parties not enough.**—The place of trial cannot be changed for the convenience of parties and witnesses. (*People v. Harris*, 4 Den., 150.)

(h) **Will be changed at the instance of district attorney.**—The place of trial may be changed at the instance of the district attorney, and if changed as to one of several defendants, it will be changed as to all. (*People v. Baker*, 3 Park., 181; 3 Abb., 43.)

§ 347. **Stay of trial, how obtained to enable defendant to apply for removal.**—To enable the defendant to make the application, a judge of the supreme court may, in his discretion, upon good cause shown by affidavit, make an order staying the trial of the indictment, until the application can be made and decided.

New.

§ 348. **Decision on application for stay, to be indorsed on papers and filed.**—When an application for an order to stay the trial is made to the supreme court, it must indorse its decision on the affidavits or other papers presented, and cause them to be immediately filed with the clerk of the court in which the indictment is pending.

New.

§ 349. **If application for stay be denied, no other application can be made.**—If the application for an order to stay the trial has been made before one judge and denied, a similar application cannot be made to another judge.

New.

§ 350. **Violation of last section a misdemeanor and contempt, and order of removal to be vacated.**—A violation of the last section is punishable not only as a misdemeanor but as a contempt of the court in which the indictment is pending; and that court must vacate an order of removal made in violation thereof.

New.

§ 351. **Order of removal to be filed, and pleadings and proceedings to be transmitted.**—If the supreme court order

the removal of the action, a certified copy of the order for that purpose must be delivered to and filed with the clerk of the court where the indictment is pending, who must thereupon transmit the same, with the pleadings and proceedings in the action, including all undertakings for the appearance of the defendant or of the witnesses, or a certified copy of the same, to the court to which the action is removed.

New.

§ 352. Proceedings on removal, if defendant be in custody.—If the defendant be in custody, and the removal be to the court of oyer and terminer of another county than that where the indictment is pending, the order must provide for the removal of the defendant, by the sheriff of the county where he is imprisoned, to the custody of the proper officer of the county to which the action is removed, and he must be forthwith removed accordingly.

New.

§ 353. Order for removal must be filed before a juror is sworn; authority of the court to which indictment is removed.—An order for the removal of the action is of no effect unless a certified copy thereof be filed, as required by section three hundred and fifty-one, before a juror is sworn to try the indictment. When thus filed, the court to which the action is removed must proceed to trial and judgment therein.

New.

TITLE VI.

OF THE PROCEEDINGS ON THE INDIOTMENT, BEFORE TRIAL.

- CHAPTER I. The mode of trial.
 II. Formation of the trial jury.
 III. Challenging the jury.

CHAPTER I.

THE MODE OF TRIAL.

- SECTION 354. Issue of fact defined.
 355. How tried.
 356. Appearance.
 357. Preparation for trial.

§ 354. **Issue of fact defined.**—An issue of fact arises,

1. Upon a plea of not guilty; or
2. Upon a plea of a former conviction or acquittal of the same crime.

New.

§ 355. **How tried.**—An issue of fact must be tried by a jury of the county in which the indictment was found, unless the action be removed, by order of the supreme court, into the court of oyer and terminer of another county, as provided in the second subdivision of section three hundred and forty-four.

8 R. S., 102, § 1.

If it appears that the offense was committed in another county, the defendant must be acquitted for want of jurisdiction. (*Griswold's case*, 1 C. H. Rec., 181.)

§ 356. **Appearance.**—If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if the indictment be for a felony, the defendant must be personally present.

Id., § 18.

(a) **Prisoner must be present, when.**—One indicted for felony must sit in the dock during trial, unless on bail. (*Tucker's case*, 5 C. H. Rec., 164.)

(b) **Must be present when verdict is rendered.**—A prisoner tried for felony must be present at the taking of the verdict. (*People v. Perkins*, 1 Wend., 91; *Son v. People*, 12 Wend., 344; *Safford v. People*, 1 Park., 474.)

The judgment record of a conviction for felony need not show the constant presence of the prisoner during trial. (*Stephens v. People*, 19 N. Y., 549; 4 Park., 396.)

(c) **Prisoner must be always present.**—If after the jury have retired for deliberation they return into court and ask certain questions as to the evidence, it is error in the court to answer the same in the absence of the prisoner. He is entitled to be personally present when any instruction is given to the jury having a tendency to influence the verdict. (*Maurer v. People*, 43 N. Y., 1.)

(d) **Argument on appeal; absence of prisoner.**—The personal presence of the defendant is not necessary on the argument or at the decision of the appellate court. (*People v. Clark*, 1 Park., 360.)

(e) **Trial of a misdemeanor; prisoner's absence.**—A defendant indicted for a misdemeanor cannot be tried in his absence, unless he has unequivocally waived his right, and given express authority to his attorney to submit to such trial. (*People v. Wilkes*, 5 How., 105.)

(f) **Prisoner need not be present on motion to quash.**—On a motion to quash it is not necessary that the defendant be present in court during the argument. (*People v. Vail*, 57 How., 81; 6 Abb. N. C., 206.)

§ 357. **Preparation for trial.**—After his plea, the defendant is entitled to at least two days to prepare for his trial, if he require it.

New.

(a) **People to procure attendance of defendant's witnesses.**—When the place of trial has been changed at the instance of the district attorney, if the defendant be in indigent circumstances the prosecution will be required to procure the attendance of their witnesses at such place of trial. (*People v. Baker*, 3 Park., 181; 3 Abb., 42.)

Where a juror is withdrawn at the request of the district attorney solely, merely because he is not prepared with his evidence, the prisoner cannot be tried again. (*People v. Barrett*, 2 Caines, 304; *Grant v. People*, 4 Park., 527.)

(b) **Absence of witnesses; grounds of continuance.**—The defendant is entitled to a continuance at the first circuit, on account of the absence of a material witness, if he have used due diligence. (*People v. Vermilyea*, 7 Cow., 369.)

(c) **Effect of withholding papers, etc.**—A new trial will not be granted because the district attorney, by mistake, has withheld papers important to the defendant, unless he has used due diligence to obtain them. (*People v. Vermilyea*, 7 Cow., 369.)

(d) **What affidavit must contain.**—An affidavit, on which to found a continuance on the ground of absence of material witnesses, need not state what is expected to be proved by them. (*Broad's case*, 3 C. H. Rec., 7; *People v. Horton*, 4 Park., 222.)

(e) **Must show character of evidence in certain cases.**—However, where an application for continuance is apparently made for delay, the character of the expected evidence must be disclosed. (*People v. Wilson*, 3 Park., 199.)

(f) **Postponement discretionary.**—The refusal to postpone trial on account of absent witnesses is discretionary, and no exception lies. (*Elghmy v. People*, 79 N. Y., 546.)

CHAPTER II.

FORMATION OF THE TRIAL JURY.

SECTION 358. Jurors in criminal courts.

§ 358. **Jurors in criminal courts.**—The trial jury is formed, as prescribed by the Code of Civil Procedure.

New.

Qualifications of jurors. (Code Civ. Proc., §§ 1027–1082, inclusive; formation of the jury, *Id.*, §§ 1163–1180, inclusive; *Id.*, §§ 1190, 1191, 1192.)

An alien is not entitled to a special jury. (*Id.*, § 1190.)

Trial jurors in Kings county. (*Id.*, §§ 1029, 1126–1162, 1174, 1191.)

Trial jurors in the city and county of New York. (*Id.*, §§ 1029, 1079–1125, 1174, 1191.)

The legislature may regulate the manner of procuring a jury. (*Stokes v. People*, 53 N. Y., 164; *Gardner v. People*, 6 Park., 155.)

Where mere irregularities in drawing a jury are not prejudicial to defendant, they are not grounds of error. (*Cox v. People*, 80 N. Y., 500; *Friery v. People*, 2 Keyes, 425; *Ferris v. People*, 35 N. Y., 125; *Dolan v. People*, 64 N. Y., 485.)

CHAPTER III.

CHALLENGING THE JURY.

SECTION 359. Definition and division of challenges.

360. When there are several defendants, they must unite in their challenges.

361. Challenge to the panel, defined.

362. Upon what founded.

363. When and how taken.

364. If sufficiency of the facts be denied, adverse party may except; exception, how made and tried.

365. If exception overruled, court may allow denial of challenge; if allowed, may permit challenge to be amended.

366. Denial of challenge, how made, and trial thereof.

367. Who may be examined on trial of challenge.

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§ 359. Definition and division of challenges.—A challenge is an objection made to trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

3 R. S., 1028, § 11.

§ 360. When there are several defendants, they must unite in their challenges.—When several defendants are tried together they cannot sever their challenges, but must join therein.

New.

(a) **Number of peremptory challenges allowed.**—Where two or more persons are jointly indicted for murder, are tried together, only twenty peremptory challenges are allowed to all the defendants. (*People v. Thayer*, 1 Park., 595.)

(b) **Joint trials and peremptory challenge; right of.**—In all cases where right of peremptory challenge does not exist, two or more persons may be indicted, and tried jointly or separately, at the discretion of the court. (*People v. Howell*, 4 Johns., 296.)

§ 361. Challenge to the panel defined.—A challenge to the panel is an objection made to all the trial jurors returned, and may be taken as well to the panel returned for the term, as to an additional panel ordered to complete the jury.

New. (3 Black. Com., 359.)

(a) **May waive right of challenge.**—A prisoner can waive a challenge to the array after it is allowed. (*Pierson v. People*, 79 N. Y., 424.)

(b) **When not waived.**—A challenge which has been overruled is not waived by asking the parties if they have any objections to the jurors that have been drawn, and a reply in the negative. (*Hathaway v. Helmer*, 25 Barb., 29; 18 Hun, 239.)

§ 362. Upon what founded.—A challenge to the panel can be founded only on a material departure, to the prejudice of the defendant, from the forms prescribed by the Code of Civil Procedure, in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

3 R. S., 706, § 185.

(a) **What irregularity is material.**—An irregularity in the drawing of the jurors which cannot affect the right of the prisoner, is not ground for challenge to the array. (*Ferris v. People*, 35 N. Y., 125; 48 Barb., 17; 1 Abb. [N. S.], 193; *Friery v. People*, 2 Keyes, 424; 2 Abb. Dec., 215; 54 Barb., 319.)

(b) **When sheriff is party.**—Good ground for challenge to the array where the sheriff serving the venire is a party to the cause. (*Woods v. Rowan*, 5 Johns., 138.) Not ground of challenge where the circuit clerk is attorney for one of the parties, and was so at the time of the drawing, making and arraying the panel. (*Wakeman v. Sprague*, 7 Cow., 720.)

(c) **What sufficient ground.**—Or that the panel was certified by the deputy clerk (*People v. Fuller*, 2 Park., 16); or on the ground that a certain class of persons were excluded in the selection of grand jurors. (*People v. Jewett*, 3 Wend., 314.)

(d) **Id.**—It is good ground for challenge, however, that certain jurors had not been duly summoned. (*McCloskey v. People*, 5 Park., 308.)

(e) **Id.**—Mode of selecting and relieving jurors when liable to challenge to the array. (*Gardiner v. People*, 6 Park., 155.)

(f) **When two sets of jurors are drawn.**—It is no cause for challenge to the array that two sets of jurors were drawn at the same time from the jury box for two distinct courts, if they be kept entirely separate. (*Crane v. Dygert*, 4 Wend., 675.)

(g) **Time of drawing.**—Nor that the panel was drawn more than fourteen days before the sitting of the court. (*Id.*)

(h) **Must be before jurors are sworn.**—A challenge to the array, if not made before the jurors are sworn, is waived. (*New York v. Mason*, 4 E. D. Smith, 142; 1 Abb., 344.)

(i) **Answer to challenge need not be verified.**—The district attorney need not verify his answer to the challenge to the array. (*Gardiner v. People*, 6 Park., 155.)

(j) **Effect of withdrawing challenge to array.**—The withdrawal of a challenge to the array is a waiver of any irregularity in the drawing of the jury. (*Pierson v. People*, 18 Hun, 239; 79 N. Y., 424.)

§ 363. When and how taken.—A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge.
New.

(a) **A challenge cannot be alternative.**—A challenge made in the alternative is bad. (*Cox v. People*, 19 Hun, 430; 80 N. Y., 500.) A challenge

to the array, if not made before the jurors are sworn is waived. (*New York v. Mason*, 4 E. D. Smith, 142; 1 Abb., 344.) An objection to a juror must be made when he is called upon a panel or it is waived. (*Secord v. Burling*, 1 How., 175; see *Lindsley v. People*, 6 Park., 283.)

§ 364. If sufficiency of the facts be denied, adverse party may except; exception, how made and tried.— If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered upon the minutes of the court; and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

New.

(a) **Verification of challenge.**— It seems that a verification of a challenge is required. A demurrer to the challenge is not the proper way to raise the objection of want of verification. (*Cox v. People*, 80 N. Y., 500; 19 Hun, 430.)

(b) **Answer not to be verified.**— The district attorney need not verify his answer to the array. (*Gardiner v. People*, 6 Park., 155.)

§ 365. If exception overruled, court may allow denial of challenge; if allowed, may permit challenge to be amended.— If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting, to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may, in like manner, permit an amendment of the challenge.

New.

§ 366. Denial of challenge, how made, and trial thereof. If the challenge be denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the court; and the court must proceed to try the question of fact.

New.

If the plaintiff challenge the array for the default of the clerk in selecting the jurors, the defendant should join issue on the challenge and triers be appointed. (*Gardner v. Turner*, 9 Johns., 260.)

A principal challenge for favor is triable by the court. (*Pringle v. Huse*, 1 Cow., 432; *People v. Vermilyea*, 7 id., 108; *Randall's case*, 5 C. H. Rec., 141.)

A challenge for principal cause may be tried by the court, and the decision of the court thereon is final. (*Stout v. People*, 4 Park., 71; *Id.*, 182.)

§ 367. Who may be examined on trial of challenge.— Upon the trial of the challenge, the officers, whether judicial or

ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

New.

§ 368. **If challenge allowed, jury to be discharged; if disallowed, jury to be impaneled.**— If, either upon an exception to the challenge or a denial of the facts, the challenge be allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If the challenge be disallowed, the court must direct the jury to be impaneled.

§ 369. **Defendant to be informed of his right to challenge an individual juror.**— Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears, and before he is sworn.

New.

(a) **Objection must be taken promptly.**— An objection to a juror must be made when he is called upon the panel, or it is waived. (*Secord v. Burling*, 1 How., 175.)

(b) **Must be before juror is sworn.**— A challenge to the array, if not made before the jurors are sworn, is waived. (*New York v. Mason*, 4 E. D. Smith, 143; 1 Abb., 344.)

(c) **Id.**— The right of challenge continues until the jurors have been actually sworn in. (*Lindsley v. People*, 6 Park., 233.)

§ 370. **Kinds of challenge to individual juror.**— A challenge to an individual juror may be taken either by the people or by the defendant, and is either

1. Peremptory, or
2. For cause.

3 R. S., 1029, §§ 12, 14, 15; 1 Bish. Crim. Proc., § 940; *Watts v. State*, 8 Ohio, 98; *Mallison v. State*, 6 Mo., 399; *Wiley v. State*, 4 Blackf., 458; *Schaeffer v. State*, 3 Wis., 823; *People v. Coniff*, 2 Park., 586.

The law giving the prosecution the right of peremptory challenge is constitutional. (*Walter v. People*, 32 N. Y., 147; 6 Park., 15; 18 Abb., 147.)

§ 371. **Challenge, when taken.**— A challenge must be taken when the juror appears, and before he is sworn; but the court

may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action.

New.

(a) **Must be taken promptly.** — An objection to a juror must be made when he is called upon the panel, or it is waived. (*Secord v. Burling*, 1 How., 175.)

(b) **Continues until juror is sworn.** — The right of peremptory challenge continues until the juror has actually been sworn. (*Lindsley v. People*, 6 Park., 233.)

(c) **May be allowed by court after juror is sworn.** — The court has power to allow a peremptory challenge, even after the juror has been sworn on the panel. (*People v. Tweed*, 13 Abb. [N. S.], 371, n.)

(d) **May be set aside at discretion before evidence taken.** — A juror, after being sworn in chief, if discovered to be incompetent may, in the exercise of sound discretion, be set aside by the court at any time before evidence is given, even in a capital case. (*People v. Damon*, 18 Wend., 351.)

§ 372. **Peremptory challenge.** — A peremptory challenge is an objection to a juror, for which no reason need be given, but upon which the court must exclude him.

New.

§ 373. **Number of peremptory challenges to which defendant is entitled.** — Peremptory challenges must be taken in number as follows:

1. If the crime charged be punishable with death, thirty;
2. If punishable with imprisonment for life, or for a term of ten years or more, twenty;
3. In all other cases, five.

3 R. S., 1028, § 9; Laws 1858, ch. 832, § 1.

The right of peremptory challenges exists where the prisoner may be punished by imprisonment in a state prison for ten years. (*Dull v. People*, 4 Den., 91.)

§ 374. **Definition and kinds of challenge for cause.** — A challenge for cause is an objection to a particular juror, and is either,

1. General, that the juror is disqualified from serving in any case; or
2. Particular, that he is disqualified from serving in the case on trial.

New.

(a) **Ground of challenge.** — That a juror's father had married the defendant's brother's widow is no ground of principal challenge. (*Cain v. Ingham*, 7 Cow., 478.)

(b) **How tried.** — A challenge for principal cause may be tried by the court, unless triers are demanded and the decision of the court thereon is final. (*Stout v. People*, 4 Park., 71 ; *Id.*, 133.)

(c) **Interest of party.** — In a "*qui tam*" action, where a moiety of the penalty goes to the town, it is a good cause for a challenge that a juror is an inhabitant of the town. (*Wood v. Stoddard*, 2 Johns., 194.)

(d) **Want of freehold good cause.** — It is a good cause of challenge that a juror is not a freeholder. (*Streeter v. Hearsay*, 11 Johns., 168.)

(e) **Property qualification.** — A want of property qualification is a good cause. (*Fennick v. Parker*, 3 Code Rep. 254.)

(f) **Alienage.** — An alien, though a freeholder, not qualified to serve as a juror in a justices' court. (*Borst v. Becker*, 6 Johns., 332.)

A juror not a freeholder nor assessed for any personal estate should be set aside, though it appears that he is worth over \$250 in personal property. (*Valton v. Loan Fund L. Ass. Co.*, 17 Abb., 268.)

(g) **Must have property requisite at time of trial.** — A juror must possess the necessary property qualification at the time of the trial. It is not enough that he was qualified at the time when placed on the jury list. (*Kelly v. People*, 55 N. Y., 565.)

(h) **What sufficient to sustain challenge.** — What sufficient to sustain a challenge on the ground of want of property qualification. (*Armstrong v. People*, 2 S. C., 157.)

(i) **Resident of city incompetent.** — A resident and taxpayer of a city is incompetent in an action wherein the city is interested, except in a suit for penalty or forfeiture. (*Deveny v. Elmira*, 51 N. Y., 506.)

(j) **Freemasonry no ground of challenge.** — No ground for challenge that the juror is a free mason, in a contest between one who is a mason and one who is not. (*People v. Horton*, 18 Wend., 9.)

§ 375. **General causes of challenge.** — General causes of challenge are :

1. A conviction for a felony ;
2. A want of any of the qualifications prescribed by the Code of Civil Procedure, to render a person a competent juror.

New.

As to general provisions regarding the necessary qualifications of jurors (See Code Civil Proc., §§ 1027, 1028.)

Disqualification of public officers. (*Id.*, § 1029.)

Qualifications in Kings county. (*Id.*, §§ 1029, 1126.)

Qualifications in the city and county of New York. (*Id.*, §§ 1029, 1079.)

§ 376. **Particular causes of challenge.** — Particular causes of challenge are of two kinds :

1. For such a bias, as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and which is known in this Code as implied bias ;

2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict.

Laws 1872, ch. 475.

(a) **Being defendant's bail disqualifies.**— That the juror is defendant's bail will disqualify. (*People v. McCollister*, 1 Wh. Cr. C., 391.) That the juror is a tenant of one of the parties is a good cause for challenge. (*Hathaway v. Helmer*, 25 Barb., 29.)

(b) **Impartiality necessary.**— A juror must not only be indifferent as to the issue, but impartial between the parties. (*Freeman v. People*, 4 Den., 9.)

(c) **Bias and opinion formed.**— It is good ground for challenge that juror has said he believed the defendant guilty. (*People v. Mather*, 4 Wend., 239; *People v. Honeyman*, 3 Den., 121; *Freeman v. People*, 4 id., 9.)

(d) **Id.**— A juror is not incompetent unless he has such a settled opinion that he could not render a verdict upon the evidence alone. (*People v. Honeyman*, 3 Den., 121; *People v. Hayes*, Edm. S. C., 583; *Lowenberg v. People*, 5 Park., 414.) A juror is incompetent if he has formed such an opinion that it will require affirmative evidence to remove it. (*Cancemi v. People*, 16 N. Y., 501.)

(e) **Id.**— A juror having stated that he had formed no opinion as to the guilt of the prisoner, but had an impression that his general character was bad, may be asked whether he could disregard what he had heard and read, and render his verdict according to evidence. (*Lohman v. People*, 1 N. Y., 379; 2 Barb., 216.)

(f) **Id.**— It seems that the formation of an opinion as to the general character of the prisoner does not disqualify. (*People v. Allen*, 43 N. Y., 28, reversing 57 Barb., 338.)

(h) **Id.**— On the trial of an indictment for murder, the formation of an opinion that the prisoner killed the deceased does not disqualify. (*Lowenberg v. People*, 27 N. Y., 336; 5 Park., 414; *O'Brien v. People*, 36 N. Y., 276; 48 Barb., 274.) Or that a crime had been committed by somebody, but not as to the guilt or innocence of the accused. (*Friery v. People*, 2 Keyes, 424; 3 Abb. Dec., 215; 54 Barb., 319.)

(*i*) **Hypothetical opinion.**—That a juror has expressed a hypothetical opinion in the defendant's case is not an objection to his competency. (*Durell v. Mosher*, 8 Johns., 445; *Riley's case*, 1 C. H. Rec., 23; *Mulligan's case*, 6 id., 69; *People v. Johnson*, 2 Wh. Cr. C., 361; *People v. Fuller*, 2 Park., 16; *Stout v. People*, 4 id., 71; *Freeman v. People*, 4 Den., 9; *Sancker v. People*, 4 Park., 535; 18 How., 72.)

(*j*) **Hostile feelings.**—On the trial of an indictment for libel on a public officer, it is ground of challenge that the juror had entertained hostile feelings towards the prosecutor by reason of a transaction touching his official duties. (*Coleman's case*, 2 C. H. Rec., 89.)

(*k*) **Opinion of guilt or innocence.**—If a juror has formed an opinion as to the prisoner's guilt or innocence from reading the evidence in the newspapers, of which he has not been able to entirely divest himself, though he says it would not affect his mind in determining the case on the evidence, the prisoner is entitled to the benefit of the doubt in a capital case. (*People v. Mallon*, 3 Lans., 224.)

(*l*) **Under act of 1872.**—Though the act of 1872 has provided that a present opinion or impression as to the guilt or innocence of a prisoner shall not in certain cases be a ground for challenge for principal cause, it is nevertheless ground of challenge for favor, and the determination of the court upon such challenge is reviewable on error. (*Thomas v. People*, 67 N. Y., 218; *People v. Mullin*, 3 Alb. L. J., 150.)

(*m*) **Impressions formed.**—It is ground of challenge that the juror has formed an impression from reading the evidence of a former trial; and thus, if he state that it will require evidence to remove such impression, even though he declare his ability to give his verdict on the evidence to be presented. (*Greenfield v. People*, 74 N. Y., 277; reversing 13 Hun, 242.)

(*n*) **Discussing case.**—A juror who testifies that he has heard the case talked about, has read part of a former trial, has expressed an opinion on what he has read, and will commence the trial with an impression on his mind, but that such impression will not influence his verdict upon the evidence, is competent under the act of 1872, chapter 475. (*Phelps v. People*, 6 Hun, 401; 72 N. Y., 334; *Thomas v. People*, 67 N. Y., 218; *People v. Mullin*, 3 Alb. L. J., 150; *Manke v. People*, 17 Hun, 410; *Balbo v. People*, 80 N. Y., 484; *Cox v. People*, Id., 500.)

§ 377. Grounds of challenge for implied bias.—A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney, or counsel for the people, or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged

to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.

3 R. S., 1028, § 8.

(a) **Relationship.** — That a juror's father had married the defendant's brother's widow, is no ground of principal challenge. (*Cain v. Ingham*, 7 Cow., 478; *Eggleston v. Smithby*, 17 Johns., 133.) That the juror is defendant's bail is ground for challenge. (1 Wh. C. C. 391; see *Cole v. Van Keuren*, 51 How., 451; *People v. Damon*, 13 Wend., 351.)

(b) **Conscientious scruples.** — On a trial for murder it is good ground for challenge that the juror has conscientious scruples against finding a verdict of guilty in a capital case. (*Selleck's case*, 1 C. H. Rec., 185; *McDonald's case*, 3 id., 45; *People v. Ryan*, 2 Wh. C. C., 47; *People v. Damon*, 13 Wend., 351; *People v. Jones*, Edm. S. C., 112; *Lowenberg v. People*, 5 Park., 114; *Walter v. People*, 32 N. Y., 147; 6 Park., 15; 18 Abb., 147; *O'Brien v. People*, 36 N. Y., 276; 48 Barb., 274; *People v. Thomas*, 3 Alb. L. J., 210.)

(c) **Juror asleep.** — Not a ground for a new trial in a capital case that one of the jurors was apparently asleep to the knowledge of the prisoner's counsel, who omitted to call the attention of the court to it. (*People v. Morrissey*, 1 Seld., 295.)

(d) **Having once tried case.** — Jurors who have tried and decided a criminal case are not competent to sit on a second trial of the same cause. (*Barclay v. People*, 3 Leg. Gaz., 278; 8 Alb. L. J., 104.)

(e) **Consanguinity.** — A new trial will not be granted on the ground of relationship of one of the jurors to one of the parties in the ninth degree, where it appears that no objection was made at the trial and no injury on that ground appears to have been sustained by the party against whom the verdict was rendered, although such relationship was then unknown to either party. (*Cole v. Van Keuren*, 51 How., 451; *Eggleston v. Smithby*, 17 Johns., 133.)

§ 378. **Grounds of challenge for actual bias.**—A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section three hundred and seventy-six, and for no other cause.

New.

§ 379. **Exemption not a ground of challenge.**—An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

New.

General grounds of exemption. (Code of Civil Pro., §§ 1030, 1031.)

Grounds of exemption in Kings county. (Id., §§ 1127, 1128.) In the city and county of New York. (Id., §§ 1081, 1082.)

§ 380. **Causes of challenge, how stated.**—In a challenge for implied bias, one or more of the causes stated in section three hundred and seventy-seven must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section three hundred and seventy-six must be alleged. In either case the challenge may be oral, but must be entered upon the minutes of the court.

New. (See *Freeman v. People*, 4 Den., 9.)

§ 381. **Exceptions to challenge and denial thereof.**—The adverse party may except to the challenge, in the same manner as to a challenge to the panel; and the same proceedings must be had thereon, as prescribed in section three hundred and sixty-four, except that, if the challenge be allowed, the jury must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

New.

§ 382. **Challenge, how tried, if denied.**—If the facts be denied, the challenge must be tried by the court which must either allow or disallow the same and direct an entry accordingly on the minutes. If the challenge be allowed, the juror must be discharged.

Laws 1873, ch. 427; 3 R. S., 1032, § 42.

A principal cause for favor is triable by the court. (*Pringle v. Hughes*, 1 Cow., 432; *People v. Vermilyea*, 5 C. H. Rec., 141.)

A challenge for principal cause may be tried by the court, unless triers are demanded. (*Stout v. People*, 4 Park., 71.)

§ 383. Juror challenged may be examined as a witness.

Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness, to prove or disprove the challenge; and is bound to answer every question pertinent to the inquiry therein.

New.

A principal challenge for favor is triable by the court; but the juror challenged may be examined as a witness. (*Pringle v. Huse*, 1 Cow., 432; *People v. Vermilyea*, 7 Cow., 198; *Randall's case*, 5 C. H. Rec., 141.)

§ 384. Rules of evidence on trial of challenges. — Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues, govern the admission or exclusion of testimony, on the trial of the challenge.

New.

§ 385. (Amended 1882.) Challenges, first by defendant and then by the people. — Challenges to an individual juror must be taken first by the people and then by the defendant.

New.

§ 386. (Amended 1881.) Order of challenges. — Challenges of either party must be taken :

1. To the panel;
2. To an individual juror, for a general disqualification;
3. To an individual juror, for implied bias;
4. To an individual juror, for actual bias;
5. Peremptory.

New.

§ 387. Jury to be sworn, etc. — The first twelve persons who appear, as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue.

3 R. S., 707, § 190.

Improper treatment of a juror by a court is a ground for a new trial (*People ex rel. Flaherty v. Neilson*, 22 Hun, 1.)

TITLE VII.

OF THE TRIAL.

CHAPTER I. The trial.

II. Conduct of the jury, after the cause is submitted to them.

III. The verdict.

CHAPTER I.

THE TRIAL.

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§ 388. **In what order trial to proceed.** — The jury having been impaneled and sworn, the trial must proceed in the following order:

1. The district attorney, or other counsel for the people, must open the case, and offer the evidence in support of the indictment;

2. The defendant or his counsel may then open his defense, and offer his evidence in support thereof;

3. The parties may then, respectively, offer rebutting testimony, but the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant or his counsel must commence, and the counsel for the people conclude the argument to the jury.

5. The court must then charge the jury.

See 8 R. S., 1029, § 19.

(a) **Must state facts to be proved only.** — Counsel will not be allowed to state facts in his opening which cannot be given in evidence to the jury. (*People v. Hetteck*, 1 Wh. C. Cas., 399.)

(b) **The court must control.** — The jury are bound by the instructions of the court as to the law, to the same extent as in civil cases. (*Duffy v. People*, 26 N. Y., 588; 5 Park., 321.)

(c) **Court cannot withdraw juror.** — After a prisoner has been put upon his trial, the judge has no power to withdraw a juror without the prisoner's consent, merely because the public prosecutor is unprepared with his evidence. (*People v. Barrett*, 2 Caines, 304; *Grant v. People*, 4 Park., 537.)

(d) **Effect of withdrawing juror.** — On a trial for felony, if the public prosecutor withdraw a juror, without any improper practice on the part of the defendant, he cannot be again put on trial for the same offense. (*Klock v. People*, 2 Park., 676.)

§ 389. **Defendant presumed innocent, until contrary proved; in case of reasonable doubt, entitled to acquittal.** A defendant in a criminal action is presumed to be innocent,

until the contrary be proved ; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

New.

§ 390. **When reasonable doubt of which degree he is guilty, he must be convicted of the lowest.** — When it appears, that a defendant has committed a crime, and there is reasonable ground of doubt, in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

New.

§ 391. **Separate trial of defendants jointly indicted.** — When two or more defendants are jointly indicted for a felony, any defendant requiring it, must be tried separately. In other cases, defendants, jointly indicted, may be tried separately or jointly, in the discretion of the court.

2 R. S., 1080, § 35.

(a) **Separate trials.** — Where four are jointly indicted, three of them cannot insist upon the fourth being tried with them. (*Armstrong v. People*, 2 S. C., 157 ; *Kelly v. People*, 55 N. Y., 565.)

(b) **Order of trial.** — The district attorney will determine the order of separate trials. (*Patterson v. People*, 46 Barb., 625.)

(c) **May be convicted of different degrees.** — Persons jointly indicted for an offense arising out of the same transaction, may be convicted of different degrees of the same crime. (*Klein v. People*, 31 N. Y., 229 ; *White v. People*, 32 id., 465.)

(d) **Id.** — Persons jointly indicted may be found guilty of different grades of the offense charged. (*People v. White*, 55 Barb., 606.)

(e) **May demand separate trial.** — Where two or more persons are jointly indicted for a felony, either is absolutely entitled to a separate trial if he demands it. (*Babcock v. People*, 15 Hun, 847.)

§ 392. **Rules of evidence in civil cases applicable in criminal cases, except where otherwise provided in this Code.** — The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code.

3 R. S., 1029, § 19.

§ 393. **Defendant as witness.** — The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

3 R. S., 1032, § 43 ; Laws 1869, ch. 678.

(a) **Cross-examination.** — Where, upon a criminal trial, the accused is offered as a witness in his own behalf, to entitle the prosecution to put to him

questions on a cross-examination, which are irrelevant to the issue, and calculated to prejudice him with the jury, they must be at least such as tend to impeach his character and credibility. (*People v. Crapo*, 76 N. Y., 288; *People v. Casey*, 72 N. Y., 394.)

(b) **Under same rules of evidence.** — Where, upon a criminal trial, the prisoner offers himself as a witness, he is subject to the same rules, upon cross-examination, as other witnesses. (*People v. Casey*, 72 N. Y., 394.)

(c) **Credibility of prisoner.** — The extent to which an examination may go to test the witnesses credibility is largely in the discretion of the court. (*Id.*)

(d) **Failure to testify.** — If the prisoner elect to testify in his own behalf, his failure to explain a fact tending to prove his guilt raises a presumption against him. (*Stover v. People*, 56 N. Y., 315.)

(e) **Amount of credibility of prisoner.** — Where a prisoner is examined in his own behalf, the credit to which he is entitled is for the jury. (*Newman v. People*, 68 Barb., 630; *People v. Brandon*, 42 N. Y., 265; *Connors v. People*, 50 N. Y., 240; *People v. Moett*, 23 Hun, 60.)

(f) **Jury may regard prisoner's refusal.** — When the jury may consider the refusal of the prisoner to testify before the coroner. (*People v. Moett*, 23 Hun, 454.)

(g) **Bad character shown affects credibility only.** — Where the accused is examined as a witness in his own behalf, and the prosecution gives evidence of his bad character, such evidence only goes to the question of his credit as a witness, and not to that of his guilt or innocence. (*Adams v. People*, 9 Hun, 89.)

§ 394. **Compensation of witness.** — The rules as to the compensation of witnesses attending trials in criminal cases, prescribed by special statutes, are continued as there defined.

3 R. S., 1024, § 69; *Id.*, 1054, §§ 80, 81, *et seq.*

§ 395. **Confession of defendant, when evidence, and its effect.** — A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

New.

(a) **Statement after crime admissible.** — What the prisoner said at any time after the commission of the crime is competent evidence against him. (*Fralich v. People*, 65 Barb., 48.)

(b) **Silence of prisoner, effect of.** — Evidence that a prisoner remained silent when charged with the commission of a crime is admissible. (*Kelly v. People*, 55 N. Y., 565; *McGuire v. People*, 3 Hun, 213; 5 S. C., 682.)

(c) **Confession of marriage in bigamy.**— In a prosecution for bigamy, the confession of the defendant is not sufficient proof of the first marriage. (*People v. Humphrey*, 7 Johns., 314.)

(d) **In blasphemy.**— A prisoner cannot be convicted of blasphemy on his own confession made out of court. (*People v. Porter*, 2 Park., 14.)

(e) **In misdemeanor.**— A voluntary confession in a case of misdemeanor reduced to writing before the magistrate may be read in court as evidence. (*Steel's case*, 5 C. H. Rec., 5.)

(f) **Confession of one not evidence against another.**— Where two are jointly tried for a felony, the statement made by one of them before the magistrate is not evidence against the other. (*Hopkins' case*, 1 C. H. Rec., 173.) Nor can it be used for the other. (4 id., 140.)

(g) **Parol confession may be proved.**— A confession not reduced to writing may be proved by the magistrate. (*Collins' case*, 4 C. H. Rec., 139; *McKenna's case*, 5 id., 174.)

(h) **Statement made when not under arrest admissible.**— On a trial for murder, statements made by the prisoner, as a witness before the coroner, before he had been charged with the crime, and before it was ascertained that a murder had been committed, are evidence against him. (*Hendrickson v. People*, 10 N. Y., 9; 1 Park., 396, 400; 8 How., 404; *People v. Thayer*, 1 Park., 595; *People v. McCraney*, 6 id., 49.)

(i) **When suspected.**— Also, even if he knew he was suspected and would be arrested. (*Teachout v. People*, 41 N. Y., 7; *People v. Montgomery*, 13 Abb. [N. S.], 207.)

(j) **When not admissible.**— If a prisoner, arrested without warrant, on suspicion of murder, be examined on oath before the coroner as a witness, his testimony thus given is not admissible on his trial. (*People v. McMahon*, 15 N. Y., 384.)

(k) **Custody of prisoner excludes.**— The mere fact of a prisoner being in custody not sufficient to exclude admissions, if neither threats, promises nor inducements were held out to him. (*People v. Rogers*, 18 N. Y., 9.)

(l) **Lawful arrest, effect of.**— A lawful arrest is not such duress as will avoid a confession. (*People v. McAllister*, 1 Wh. Cr. Cas., 392.)

(m) **Evidence of confession.**— Evidence of a confession, if voluntary, not excluded because he was under arrest simply. (*Hartung v. People*, 4 Park., 319; *O'Brien v. People*, 48 Barb., 274.)

(n) **Voluntary confession.**— If a confession be wholly voluntary it is admissible though made to a police officer. (*People v. Wentz*, 37 N. Y., 303.)

(o) **Confession on promise.**— A confession to a magistrate who told the prisoner it would be better for him to make a full confession, not admissible. (*People v. Ward*, 15 Wend., 231; *People v. Phillips*, 42 N. Y., 200; 57 Barb., 353.)

(p) **Previous promise.**— A confession made under the influence of a previous promise not evidence. (*Thorn's case*, 4 C. H. Rec., 81; *Bowerhans' case*, Id., 136; *Stage's case*, 5 id., 177; *People v. Robertson*, 1 Wh. C. C., 66.)

(q) **Confession on threats.**— If a prisoner under the influence of threats, make a confession which he repeats on the following day to the police magis-

trate, it is not evidence against him. (*Williams' case*, 1 C. H. Rec., 149; *People v. Rankin*, 2 Wh. C. C., 467.)

(*r*) **On favor.**—If a confession be made under the influence of favor, be afterwards repeated to others not in the presence of him who promised favor, it is evidence. (*Milligan's case*, 6 C. H. Rec., 69.)

(*s*) **Obtained by fraud.**—Where a confession is objected to as obtained by improper inducements, the question is, whether the inducement held out was calculated to make the confession an untrue one. (*People v. Smith*, 3 How., 226.)

(*t*) **By artifice.**—A confession, if voluntary, may be read in evidence, though obtained by artifice. The weight to be attached to it is for the jury. (*Jeffers v. People*, 5 Park., 522.)

(*u*) **Evidence growing out of confession.**—If the confession of a prisoner made under promise of favor lead to other evidence, such facts may be proved against him. (*Jackson's case*, 1 C. H. Rec., 28; *Tucker's case*, 5 id., 164; *Stage's case*, Id., 177; *Duffy v. People*, 26 N. Y., 588; 5 Park., 321.)

(*v*) **Confession as to collateral facts admissible.**—No error to admit the confession of a prisoner to the officer as to where he secreted the money; it appearing that the money was found in the place designated. (*Done v. People*, 5 Park., 364.)

(*w*) **Must be construed together.**—The whole of defendant's confession is to be taken together. (*Hicks' case*, 1 C. H. Rec., 66.)

(*x*) **Additional proof.**—What additional proof is necessary. (*People v. Hennessey*, 15 Wend., 147; *People v. Badgley*, 16 id., 53.)

(*y*) **Declarations of prisoner.**—The declarations of a prisoner as to matters within his knowledge, or of which he may be presumed to have knowledge, and which are relevant and material to the inquiry, may be used as evidence against him. (*Coleman v. People*, 58 N. Y., 555.) *

(*z*) **Involuntary statement.**—A statement made by a prisoner not involuntary, because made after his arrest, and whilst in custody of the officer. (*Murphy v. People*, 68 N. Y., 590; 4 Hun, 102.)

§ 396. Evidence on trial for treason.—Upon a trial for treason the defendant cannot be convicted, except upon the testimony of two witnesses to the same overt act, or of one witness to one overt act, and another witness to a different overt act of the same treason. But if two or more distinct treasons, of different kinds, be alleged in the indictment, two witnesses to prove different treasons are not sufficient to warrant a conviction.

3 R. S., 1029, § 20.

§ 397. Evidence on trial for treason.—Upon a trial for treason, evidence cannot be admitted, of an overt act not expressly charged in the indictment; nor can the defendant be convicted, unless one or more overt acts be expressly alleged therein.

Id., § 21; 1 R. L., 845, § 5.

§ 398. **Evidence on trial for conspiracy.** — Upon a trial for a conspiracy, in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted, unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but any other overt act, not alleged in the indictment, may be given in evidence.

Id., § 22.

(a) **Previous conspiracy.** — A previous conspiracy to defraud may be inferred from the subsequent acts of defendants. (*Taylor's case*, 1 C. H. Rec., 192.)

(b) **Overt act must be shown.** — Under the Revised Statutes an indictment in all cases of conspiracy, except agreements to commit a felony upon the person of another, or to commit arson or burglary, must contain a charge of one or more overt acts, some or one of which must be proved on the trial. (*People v. Chase*, 16 Barb., 495.)

§ 399. (Amended 1882.) **Conviction cannot be had on testimony of accomplice, unless corroborated.** — A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

New.

(a) **Caution regarding an accomplice.** — A prisoner may be convicted on the testimony of an accomplice, but it should be received with great caution. (*People v. Costello*, 1 Den., 88; *Ynguanzo v. Saloman*, 8 Daly, 158; *Coats v. People*, 4 Park., 662; *People v. Haynes*, 55 Barb., 450; 88 How., 869; *People v. Lawton*, 56 Barb., 126.)

(b) **Corroboration of accomplice.** — The testimony of an admitted accomplice ought to be corroborated in some material point, in order to render it safe to convict. (*Fraser v. People*, 54 Barb., 306; *People v. Haynes*, 55 Barb., 450; 88 How., 869; *People v. Lawton*, 56 Barb., 126.)

(c) **Court must exercise discretion.** — The testimony of an accomplice may be received on the trial of an indictment for murder; it is a matter in the discretion of the court. (*Lindsay v. People*, 5 Hun, 104; 67 Barb., 548; 68 N. Y., 143.)

Nature of corroborating evidence. (*Id.*)

(d) **Corroboration and principle of practice.** — The rule requiring the evidence of an accomplice to be corroborated is one of practice and not of law; a jury may convict on uncorroborated evidence. (*Lindsay v. People*, 68 N. Y., 143.)

(e) **Jury to determine credibility.** — The credit to be given to the testimony of an accomplice is wholly a question for the jury. (*Maine v. People*, 9 Hun, 113.)

(b) **One co-defendant competent witness against other.** — When two joint defendants are separately tried, his co-defendant is a competent witness against him. (*People v. Satterlee*, 6 Hun, 167; *Taylor v. People*, 12 id., 212.)

(g) **Extent of corroboration required.** — The corroboration of an accomplice must be of some fact or facts which tend to the guilt of the prisoner. (*People v. Davis*, 21 Wend., 309.)

§ 400. **If testimony show higher offense than that charged, court may discharge jury, and hold defendant to answer a new indictment.** — If it appear by the testimony, that the facts proved constitute a crime of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed, or continued on or admitted to bail, to answer any new indictment which may be found against him for the higher offense.

New.

§ 401. **If new indictment not found, defendant to be tried on the original indictment.** — If an indictment for the higher crime be dismissed by the grand jury, or be not found at or before the next term, the court must again proceed to try the defendant on the original indictment.

New.

§ 402. **Court may discharge jury where it has not jurisdiction of the offense, or the facts do not constitute an offense.** — The court may also direct the jury to be discharged, where it appears that it has not jurisdiction of the crime, or that the facts, as charged in the indictment, do not constitute a crime.

New.

§ 403. **Proceedings, if jury discharged for want of jurisdiction of the offense, when committed out of the State.** — If the jury be discharged, because the court has not jurisdiction of the crime charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the court may order the defendant to be discharged, or to be detained for a reasonable time specified in the order, until a communication can be sent by the district attorney to the chief executive officer of the state, territory or district where the crime was committed.

New

§ 404. Proceedings in such case, when offense committed in the State.—If the crime were committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the crime be a misdemeanor only, it may admit him to bail, in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, appear in such court to await a warrant from the proper county for his arrest.

New.

§ 405. Proceedings in such case, when offense committed in the state.—In the case provided for in the last section, the clerk must forthwith give notice to the district attorney of the proper county, that the defendant has been so committed or held to bail.

New.

§ 406. Proceedings in such case, when offense committed in the state.—If the defendant be not arrested, as provided in section four hundred and four, on a warrant from the proper county, he must be discharged from custody, or his bail in the action be exonerated, or money deposited instead of bail refunded, as the case may be; and the sureties in the undertaking mentioned in that section must be discharged.

New.

§ 407. Proceedings in such case, when offense committed in the state.—If the defendant be arrested, the same proceedings must be had thereupon, as upon the arrest of a defendant in another county, on a warrant of arrest issued by a magistrate.

New. (See §§ 156, 157, *ante*, and cases there cited.)

§ 408. Proceedings, if jury discharged because the facts do not constitute an offense.—If the jury be discharged, because the facts as charged do not constitute a crime, the court must order the defendant, if in custody, to be discharged therefrom, or if admitted to bail, that his bail be exonerated or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted;

in which case, it may direct that the case be resubmitted to the same or another grand jury.

New.

§ 409. **Proceedings, if jury discharged because the facts do not constitute an offense.** — If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections 318 and 319.

New.

§ 410. (Amended 1882.) **When evidence on either side is closed, court may advise acquittal; effect of the advice.** If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant and they must follow the advice.

New.

(a) **Absence of proof of guilt.** — Where there is no legal proof of the offense charged, the court must direct a verdict in favor of the accused. (*Babcock v. People*, 15 Hun, 847.)

(b) **Direct acquittal.** — The court may direct, and in a proper case ought to direct an acquittal. (*Howell v. People*, 5 Hun, 621; 69 N. Y., 607; *People v. Bennett*, 49 id., 137; *Duffy v. People*, 26 id., 588.)

(c) **Cannot direct verdict of guilty.** — Court has no power to direct a verdict of guilty. (*Howell v. People*, 5 Hun, 620; 69 N. Y., 607; see *Case v. People*, 6 Abb. N. C., 151.)

§ 411. **View of premises, when ordered, and how conducted.** — When, in the opinion of the court, it is proper that the jury should view the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose.

New.

No person should talk with the jury while viewing the premises. (53 Cal., 61.)

When, in a capital case after the testimony was closed, several members of the jury while walking out for exercise, by leave of the court, in charge of the officers, visited the scene of the homicide and examined it, it was held ground for new trial. (*Eastwood v. People*, 3 Park., 25; 14 N. Y., 562.)

§ 412. **Duty of officer as to jury.** — The officers, mentioned in the last section, must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any

subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

New.

Officer must be sworn. (*Hare v. State*, 4 How. [Miss.], 187 ; *Lewis v. People*, 44 Ill., 452 ; *Com. v. Shields*, 2 Bush., 81 ; *Brucker v. State*, 16 Wis., 333.)

§ 413. **Knowledge of juror, to be declared in court, and juror to be sworn as witness.** — If a juror have any personal knowledge, respecting a fact in controversy in a cause, he must declare it in open court, during the trial. If, during the retirement of the jury, a juror declare a fact, which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness, and examined in the presence of the parties.

New.

§ 414. **Jurors may be permitted to separate during the trial ; if kept together, oath of the officers.** — The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or be kept in charge of proper officers. Such officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof.

New. (1 Bish. Crim. Proc., §§ 994, 995 ; *People v. Montgomery*, 18 Abb. [N. S.], 207.)

§ 415. **Jurors not to converse together on the subject of the trial, nor form an opinion until the cause is submitted.** — The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court, that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.

New. (1 Bish. Crim. Proc., § 996 ; *McCreary v. Com.*, 5 Casey [Pa.], 323, 327 ; *Crocker v. Hoffman*, 48 Ind., 207.)

§ 416. **Proceedings, where juror becomes unable to perform his duty before conclusion of trial.** — If, before the

conclusion of the trial, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged, and another jury to be then or afterward impaneled.

New.

(a) **Must be twelve jurors.** — The trial must be had before twelve jurors and the prisoner cannot waive that right. (*Cancemi v. People*, 18 N. Y., 128; 7 Abb., 271.)

§ 417. Court to decide questions of law arising during trial. — The court must decide all questions of law which arise in the course of the trial.

New.

It is error to submit a question of law to the jury. (*Glauous v. Black*, 67 N. Y., 563.)

In criminal as well as civil cases it is the province of the court to decide questions of law and the jury questions of fact. (*People v. Finnegan*, 1 Park., 147.)

§ 418. On indictment for libel, jury to determine law and fact. — On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

N. Y. State Const., art. I, § 8; 1 R. S., 376, § 21.

§ 419. In all other cases, court to decide questions of law, subject to right of defendant to except. — On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

Held, that in a criminal case the jury had the power but not the right to determine the law as well as the facts by a verdict of not guilty. (*People v. Pine*, 2 Barb., 566.)

§ 420. Charge to jury. — In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact.

New.

A new trial will not be granted because the judge, though requested, declined to charge the jury, there being no question of law in the case. (*People v. Gray*, 5 Wend., 289.)

§ 421. **Jury may decide in court, or retire in the custody of officers; oath of the officers.**—After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

New.

(a) **Jury separating, effect of.**—When a jury separates without authority, they may be discharged and a new trial had. (*People v. Reagle*, 60 Barb., 527.)

(b) **Reading newspapers.**—A new trial in a capital case will not be granted merely because the jury read a newspaper containing a report of the trial, but without any comments which would prejudice the prisoner. (*People v. Gaffney*, 14 Abb. [N. S.], 36.)

§ 422. **When defendant on bail appears for trial, he may be committed.**—When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court; and he must be committed and held in custody accordingly.

New.

CHAPTER II.

CONDUCT OF THE JURY AFTER THE CAUSE IS SUBMITTED TO THEM.

SECTION 423. Room and accommodations for the jury after retirement, how provided.

424. Accommodations for the jury, when kept together during the trial, or after retirement.

425, 426. What papers the jury may take with them.

427. May return into court for information.

428. When jury to be discharged before agreement.

429. Reason for discharge.

430. When jury discharged or prevented from giving a verdict, cause to be again tried.

431. Court may adjourn during absence of jury, as to other business, but deemed open till verdict rendered or jury discharged.

432. Final adjournment of court discharges jury.

§ 423. **Room and accommodations for the jury after retirement, how provided.**—A room must be provided by the supervisors of the county (or if the trial be in a city court, by the corporate authorities of the city), for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the supervisors or corporate authorities neglect this duty, the court may order the sheriff to perform it; and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge.

New.

§ 424. **Accommodations for the jury, when kept together during the trial, or after retirement.**—While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county (or if the trial be in a city court, at the expense of the city), with suitable and sufficient food and lodging.

New. (1 Bish. Crim. Proc., § 997; *O'Shields v. State*, 55 Ga., 696; *State v. O'Brien*, 7 R. I., 336; *State v. Caulfield*, 23 La. An., 148; *Com. v. Roby*, 12 Pick., 496; *State v. Hamilton*, 19 Ohio, 116; *People v. Kelly*, 46 Cal., 355; 55 Ga., 696.)

§ 425. **What papers the jury may take with them.**—The court may permit the jury, upon retiring for deliberation, to take with them any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and the counsel for the people.

New. The minutes of the trial judge cannot be considered by the jury. (*Mitchell v. Carter*, 14 Hun, 448, 451; *Hancock v. Salmon*, 8 Barb., 564.)

§ 426. **What papers the jury may take with them.**—The jury may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

New. The minutes of the trial judge cannot be considered by the jury. (*Mitchell v. Carter*, 14 Hun, 448, 451; *Hancock v. Salmon*, 8 Barb., 564.)

§ 427. **May return into court, for information.**—After the jury have retired for deliberation, if there be a disagreement between them, as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must

require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant.

New.

(a) **Prisoner must be present.** — Instructions to a jury can only be given when defendant is present. (*Maurer v. People*, 43 N. Y., 1.)

(b) **Must come into court.** — Communications cannot be sent to a jury after retiring, even by consent; they must be brought into court. (*Plunkett v. Appleton*, 51 How., 469; *Plunkett v. Appleton*, 9 J. & Sp., 159; *Gillotte v. Jackson*, Id., 308.)

(c) **Waiver of irregularity.** — Communication between judge and jury in absence of counsel; what is a waiver of the irregularity; when a ground for a new trial. (*Mahoney v. Decker*, 18 Hun, 365.)

(d) **In civil case.** — In a civil case a communication may be sent in to the jury by consent of both counsel. (*Plunkett v. Appleton*, 51 How., 469.)

§ 428. **When jury to be discharged before agreement.** — After the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon only in the following cases :

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court rendering it expedient to keep them longer together ; or

2. When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict ; or

3. When with the leave of the court, the public prosecutor and the counsel for the defendant consent to such discharge.

New.

(a) **Must not coerce jury.** — It is error for the court to constrain the jury by saying they must agree or no discharge. (*Slater v. Mead*, 53 How., 57.)

(b) **Effect of.** — The statement of the judge that if the jury did not agree before the adjournment of court, they would have to remain in their room over night, cannot be construed into a threat of coercion. (*Berry v. People*, 19 Alb. L. J., 336.)

(c) **Effect of separation.** — Where the jury in a criminal case separate without authority, and without having agreed upon a verdict, they may be discharged. (*People v. Reagle*, 60 Barb., 527.)

(d) **Effect of disagreement.** — In case of disagreement the jury may be discharged by the court and the prisoner be retried. (*People v. Goodwin*, 18 Johns., 187; *Hauhurst's case*, 2 C. H. Rec., 33; *People v. Ward*, 1 Wh. C. C., 469.)

(e) **In misdemeanors.**—In cases of misdemeanor the court of sessions may discharge the jury without consent of the prisoner and he be retried again. (2 Johns. Cas., 275; *People v. Goodwin*, 18 Johns., 187.)

(f) **Discharge discretionary.**—The discharge of a jury without agreeing upon a verdict rests in the sound discretion of the court. (*People v. Green*, 13 Wend., 55.)

§ 429. **Reason for discharge.**—Whenever the jury is discharged without a verdict, the reason for the discharge must be entered on the minutes.

New.

§ 430. **When jury discharged or prevented from giving a verdict, cause to be again tried.**—In all cases where a jury are discharged, or prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment, during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term.

New.

In cases of both felony or misdemeanor where a jury are unable to agree and are discharged, the prisoner may be retried by another jury. (*People v. Goodwin*, 18 Johns., 187.)

So, also, where, being unable to agree, they separate without authority. (*People v. Reagle*, 60 Barb., 527.)

In cases of misdemeanor the court of sessions may discharge the jury and he may be retried. (*People v. Denton*, 2 Johns. Cas., 275.)

§ 431. **Court may adjourn during absence of jury, as to other business, but deemed open till verdict rendered or jury discharged.**—While the jury are absent, the court may adjourn from time to time, as to other business; but it is nevertheless deemed open, for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

New.

§ 432. **Final adjournment of court discharges jury.**—A final adjournment of the court discharges the jury, but any term of a court may be continued for the purpose of finishing a trial or receiving a verdict.

New.

CHAPTER III.

THE VERDICT.

- SECTION 433.** When the jury have agreed, to be brought into court and their names called; if all do not appear, jury to be discharged and cause again tried.
434. In felony, defendant must be present; in misdemeanor, verdict may be rendered in his absence.
435. Manner of taking the verdict.
436. Verdict may be general or special.
437. General verdict.
438. Special verdict.
- 439, 440. Special verdict; how rendered.
441. Special verdict; how brought to argument.
442. Judgment thereon.
443. When special verdict defective, new trial to be ordered.
444. Upon indictment for crime consisting of different degrees, jury may convict of any degree, or of any attempt to commit the crime.
445. In other cases, jury may convict of any offense necessarily included in that charge.
446. On indictment against several, jury may render a verdict as to some, and the cause be again tried as to the others.
- 447, 448. In what cases court may direct a reconsideration of the verdict.
449. When judgment may be given upon an informal verdict.
450. Polling the jury.
451. Recording the verdict.
452. Defendant, when to be discharged or detained after acquittal.
453. Proceedings upon general verdict of conviction, or a special verdict.
454. When defendant acquitted on the ground of insanity, the fact to be stated with the verdict; commitment of defendant to state lunatic asylum.

§ 433. When the jury have agreed, to be brought into court and their names called; if all do not appear, jury to be discharged and cause again tried. — When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that event, the cause may be again tried, at the same or another term.

New.

§ 434. In felony, defendant must be present; in misdemeanor, verdict may be rendered in his absence. — If the

indictment be for felony, the defendant must, before the verdict is received, appear in person. If it be for a misdemeanor, the verdict may be rendered in his absence.

New.

(a) **In felony.** — A prisoner tried for felony must be present at the taking of the verdict. (*People v. Perkins*, 1 Wend., 91; 43 Cal., 168; 62 Ind., 46; 19 Gratt., 656; 18 Penn. St., 103; 2 Sneed, 550; 55 Ga., 521; 49 Miss., 416; 69 Penn. St., 286.)

(b) **Misdemeanor.** — A defendant tried for misdemeanor may waive the right of being present at the taking of the verdict. (*People v. Wilkes*, 5 How., 105; 23 Cal., 160; 17 Wis., 675; 6 Ired., 164; 14 Mich., 300.)

That the prisoner was absent must be proved by the defendant. (31 Cal., 627; 33 id., 99.)

§ 435. **Manner of taking the verdict.** — If the jury appear, they must be asked by the court or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they must, on being required, declare the same.

New.

§ 436. **Verdict may be general or special.** — The jury may either render a general verdict, or when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict.

3 R. S., 707, § 197.

(a) **Effect of verdict of guilty.** — Under the general verdict of guilty, sentence for the highest offense charged in the indictment is proper. (*Hawkes v. People*, 75 N. Y., 487; *Conkey v. People*, 1 Abb. Dec., 418; 5 Park., 31 *People v. McGeerey*, 6 Park., 653; *People v. Bruno*, Id., 657.)

§ 437. **General verdict.** — A general verdict upon a plea of not guilty is either "guilty" or "not guilty;" which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people," or "for the defendant."

New.

(a) **Effect of verdict of guilty.** — Upon a plea of guilty to all the counts in the indictment, the court may give a general judgment applicable to any count thereof. (*Polinsky v. People*, 11 Hun, 390; 73 N. Y., 65.)

(b) **Includes highest sentence.** — Under the general verdict of guilty the highest sentence for the highest offense charged in the indictment is proper. (*Hawker v. People*, 75 N. Y., 487.)

§ 438. **Special verdict.** — A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

It must present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented as that nothing remains to the court but to draw from them conclusions of law.

New. (1 Bish. Crim. Proc., § 1006.)

(a) **Must contain all facts.** — A special verdict must contain all the facts necessary to sustain the judgment. (*Casey v. Dwyre*, 15 Hun, 158.)

(b) **Must contain facts only.** — Must contain the facts and not merely the evidence of them. (*Fuller v. Van Geisen*, 4 Hill, 171; *Hill v. Coveil*, 1 N. Y., 522.)

(c) **When null and void.** — A special verdict finding that the defendant did not appear nor offer any evidence in support of his plea, is a nullity. (*Merwan v. Ingersoll*, 8 Cow., 367.)

(d) **Irregularity of verdict.** — A special verdict which presents no other question than the relevancy of evidence is irregular. (*Welland Canal Co. v. Hathaway*, 8 Wend., 480.)

(e) **Must find as to all issues.** — A special verdict is defective which does not find as to all the issues. (*Kentz v. McNeal*, 1 Den., 486.)

(f) **Must decide all questions of fact.** — A special verdict must find all the questions of fact, so as to leave nothing undetermined except conclusions of law. (*Sesson v. Barrett*, 2 N. Y., 406.)

A special verdict need not contain facts admitted by the pleadings. (*Barto v. Himrod*, 8 N. Y., 483.)

(g) **Fact omitted, effect of.** — When a fact not controverted has been inadvertently omitted in a special verdict the court will grant a new trial unless the opposite party will consent to amend it. (*Watson v. Delafield*, 1 Johns., 150.)

(h) **Requisites of.** — The requisites of a special verdict are the same under the Code as at common law. (*Williams v. Willis*, 7 Abb., 90.)

§ 439. **Special verdict; how rendered.** — The special verdict must be reduced to writing, by the jury or in their presence, entered upon the minutes of the court, read to the jury, and agreed to by them, before they are discharged.

New.

§ 440. **Special verdict; how rendered.** — The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury.

New.

We, the jurors, agree that "the defendant is guilty of murder in the second degree," is good in substance and form. (46 Cal., 242.)

Or do find a verdict of manslaughter, is sufficient. (49 Cal., 427.)

Where there are several counts the accurate practice is to find specially on each count. (76 Ill., 380.)

§ 441. **Special verdict; how brought to argument.**—The special verdict may be brought to argument by either party, upon five days' notice to the other, at the same or another term of the court; and upon the hearing thereof, the counsel for the defendant may conclude the argument.

New.

(a) **Before circuit judge.**—A special verdict must, in the first case, be heard and decided by the circuit judge, unless otherwise ordered. (*Bank of Monroe v. Brockway*, 18 Wend., 680.)

(b) **At special term.**—On a special verdict judgment must be moved at special term; it cannot be sent to the general term in the first instance. (*Griswold v. Dexter*, 62 Barb., 648.)

§ 442. **Judgment thereon.**—The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, as provided in sections four hundred and forty-four and four hundred and forty-five, judgment must be given accordingly; but if otherwise, judgment of acquittal must be given;

2. If the plea be a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal.

New.

§ 443. **When special verdict defective, new trial to be ordered.**—If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial.

New.

(a) **Must find facts only.**—A special verdict must find the facts and not merely the evidence of them. (*Fuller v. Van Geisen*, 4 Hill, 171; *Hill v. Covell*, 1 N. Y., 522.)

A special verdict is defective which does not find as to all the issues. (*Kentz v. McNeal*, 1 Den., 436.)

(b) **Omitting fact inadvertently, effect of.**—When a fact not controverted has been inadvertently omitted in a special verdict, the court will grant a "*venire de novo*" unless the opposite party will consent to amend it. (*Watson v. Delafield*, 1 Johns., 150.)

(c) **Incomplete verdict.**—Where a special verdict is taken which does not dispose of all the material issues, subject to the opinion of the court at general term, a new trial must be awarded. (*Eisman v. Swan*, 6 Bos., 668.)

§ 444. Upon indictment for offense consisting of different degrees, jury may convict of any degree, or of any attempt to commit the offense.—Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime.

3 R. S., 995; § 48; see Penal Code, § 35; 2 R. S. (Edm.), 725, § 27.

(a) **Burglary, or an attempt at burglary.**—A prisoner indicted for burglary may be convicted for an attempt to commit the crime. (*People v. Lawton*, 56 Barb., 126; *People v. Jackson*, 3 Hill, 92; *Dedien v. People*, 22 N. Y., 178; distinguished in 80 N. Y., 333.)

(b) **Similarity of offense.**—A conviction for a lesser degree of crime than that charged in the indictment is good, where the act proved is similar to that charged. (*Keefe v. People*, 40 N. Y., 348; *Dedien v. People*, 22 N. Y., 178; see, also, *People v. Saunders*, 4 Park., 196.)

(c) **When conviction sufficient.**—A conviction will be sustained if otherwise valid, notwithstanding there is an allegation in the indictment of facts characterizing a higher crime. (*People v. Lohman*, 2 Barb., 216.)

(d) **Doubt as to degree.**—Where there is reasonable doubt as to the degree, the jury should convict of the lesser. (*People v. Lamb*, 3 Keyes, 860; 2 Abb., 148; 54 Barb., 342; *McKenna v. People*, 10 N. Y. W. Dig., 343.)

§ 445. In other cases, jury may convict of any offense necessarily included in that charge.—In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment.

New.

(a) **Burglary or larceny.**—Under an indictment for burglary the prisoner may be convicted of a simple larceny. (*People v. Snyder*, 2 Park., 23.)

(b) **Felony or misdemeanor.**—Under an indictment for a felony the prisoner may be convicted of a crime of the same class of an inferior grade though only a misdemeanor. (*People v. Jackson*, 3 Hill, 92; *Palmer v. People*, 5 id., 427; see, also, cases cited under § 445, *ante*.)

§ 446. On indictment against several, jury may render a verdict as to some, and the cause be again tried as to the others.—On an indictment against one or more, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judg-

ment must be entered accordingly; and the case, as to the rest, may be tried by another jury.

New. (See § 292, *ante*.)

Where in an indictment against three the trial evidence discloses that one party is innocent he may be discharged. (*People v. Costello*, 1 Den., 83)

If the acts of several persons committing the offense are a part of one and the same transaction, and the offense in law admits of different degrees, they may be convicted of different degrees. (*Klein v. People*, 31 N. Y., 229.)

§ 447. In what cases court may direct a reconsideration of the verdict.—When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict; and if, after the reconsideration, they return the same verdict, it must be entered. But when there is a verdict of acquittal, the court cannot require the jury to reconsider it.

New. (See *Hegeman v. Cantrell*, 8 J. & Sp., 381.)

§ 448. In what cases court may direct a reconsideration of the verdict.—If the jury render a verdict which is neither a general nor a special verdict, as defined in sections four hundred and thirty-seven and four hundred and thirty-eight, the court may, with proper instructions as to the law, direct them to reconsider it; and it cannot be recorded, until it be rendered in some form, from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially, and leave the judgment to the court.

New.

§ 449. When judgment may be given upon an informal verdict.—If the jury persist in finding an informal verdict, from which, however, it can be clearly understood, that their intention is to find in favor of the defendant, upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given, unless the jury expressly find against the defendant, upon the issue, or judgment be given against him on a special verdict.

New.

§ 450. Polling the jury.—When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement

of either party; in which case they must be severally asked whether it is their verdict; and if any one answer in the negative, the jury must be sent out for further deliberation.

New.

(a) **When juror may dissent.** — Until a verdict is openly delivered and recorded any of the jurors may dissent from it on being polled. (*Root v. Sherwood*, 6 Johns., 68.)

(b) **Must be polled before verdict is recorded.** — The jury may be polled at any time before the verdict is recorded. (*Fox v. Smith*, 8 Cow., 23; *Labar v. Koplin*, 4 N. Y., 547.)

(c) **May be polled where sealed verdict is given.** — A party is entitled to poll the jury when a sealed verdict is brought in. (*Fink v. Hawkes*, 2 Wend., 619.)

(d) **Form of polling.** — In polling a jury the only inquiry is, "Is this your verdict?" (*Labar v. Koplin*, 4 N. Y., 547.)

(e) **Objections to form.** — Any objection to the form of polling the jury, not taken at the time, is waived. (*Green v. Bliss*, 12 How., 428.)

§ 451. Recording the verdict. — When the verdict is given, and is such as the court may receive, the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case.

New.

Until a verdict is openly delivered and recorded any of the jurors may dissent. (*Root v. Sherwood*, 6 Johns., 68.)

At any time before the verdict is recorded the jury may be polled. (*Fox v. Smith*, 8 Cow., 23; *Labar v. Koplin*, 4 N. Y., 547.)

(a) **Cannot amend verdict after recording.** — If the verdict be defective in substance the court has no power to amend it after being received and recorded. (*Herleberg v. Murray*, 8 J. & Sp., 271.)

§ 452. Defendant, when to be discharged or detained after acquittal. — If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given; except that when the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a new indictment may be preferred, in the same manner and with the like

effect as provided in sections four hundred and eight and four hundred and nine.

New.

Questions of variance between the proof given at the trial and the indictment cannot be raised on a motion in arrest of judgment. (*Case v. People*, 6 Abb. N. C., 151.)

§ 453. Proceedings upon general verdict of conviction or a special verdict. — If a general verdict be rendered against the defendant, or a special verdict be given, he must be remanded; if in custody, or if on bail, he may be committed to the proper officer of the county, to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money be deposited instead of bail, it must be refunded to the defendant.

New.

§ 454. When defendant acquitted on the ground of insanity, the fact to be stated with the verdict; commitment of defendant to state lunatic asylum. — When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane.

New.

TITLE VIII.

OF THE PROCEEDINGS AFTER TRIAL AND BEFORE JUDGMENT.

- CHAPTER I. Bill of exceptions.
II. New trials.
III. Arrest of judgment.

CHAPTER I.

BILL OF EXCEPTIONS.

SECTION 455. In what cases.

456. By whom settled, and how filed.
457. To be settled at the trial, or the point noted in writing.
458, 459. When and how settled, after the trial.
460. Enlarging the time therefor.
461. Effect of not serving exceptions or amendments, within the time prescribed.

§ 455. **In what cases.**—On the trial of an indictment, exceptions may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases:

1. In disallowing a challenge to the panel of the jury;
2. In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing or disallowing such challenge;
3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

§ R. S., 1003, § 26.

(a) **All proceedings should be embraced.**—The decision of the court in a criminal case upon a material legal question, fundamental in its character, excepted to before impanelling the jury, should be deemed incorporated into the proceedings on the trial. (*Starin v. People*, 45 N. Y., 333.)

(b) **May review decision of challenge.**—If the court overrule a challenge to favor, when properly made, it may be reviewed on exception; and also when the court refuses to allow competent evidence to be given in determining the challenge. (*People v. Bodine*, 1 Den., 231; *People v. Honeyman*, 3 id., 121; *People v. Knickerbocker*, 1 Park., 302; *People v. Rathbun*, 21 Wend., 509; *Stout v. People*, 4 Park., 132.)

(c) **Wholly irrelevant evidence not ground.**—The rejection of evidence which is wholly irrelevant to the issues is not a ground of exception. (*Purchase v. Matteson*, 6 Duer, 587.)

§ 456. **By whom settled, and how filed.** — A bill containing the exceptions must be settled and signed by the presiding judge, and filed with the clerk.

Id.

§ 457. **To be settled at the trial, or the point noted in writing.** — The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given, the point of the exception must be particularly stated in writing, and delivered to the court, and must immediately be corrected or added to, until it is made conformable to the truth.

3 R. S., 1080, § 27.

§ 458. **When and how settled, after the trial.** — If the bill of exceptions be not settled at the trial it must be prepared and served, within five days thereafter, on the district attorney, who may, within five days, serve on the defendant or his counsel, amendments thereto. The defendant may then, within five days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, whether in or out of court, not less than five nor more than ten days thereafter, to have the bill of exceptions settled.

New.

§ 459. **When and how settled, after the trial.** — At the time appointed, the judge must settle and sign the bill of exceptions.

New.

§ 460. **Enlarging the time therefor.** — The time for preparing the bill of exceptions or the amendments thereto, or for settling the same, may be enlarged by consent of the parties, or by the presiding judge, or by a judge of the supreme court, but by no other officer.

New.

§ 461. **Effect of not serving exceptions or amendments, within the time prescribed.** — If the bill of exceptions be not served within the time prescribed in section four hundred and fifty-eight, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served, and the parties omit, within the time limited by section

four hundred and fifty-eight, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, and the other to the amendments.

New. (See Sup. Ct. Rule 88; see, also, *Rankin v. Pina*, 4 Abb., 409; *Carraher v. Carraher*, 42 How., 458; *Phelps v. Swan*, 2 Sweeney, 696.)

CHAPTER II.

NEW TRIALS.

SECTION 462. New trial.

463. When granted.

464. Effect of granting new trial.

465. In what cases granted.

466. Application, when to be made.

§ 462. **New trial.** — A new trial is a re-examination of the issue, in the same court, before another jury, after a verdict has been given.

New.

§ 463. **When granted.** — A new trial can be granted by the court in which the former trial was had only in the cases provided in section four hundred and sixty-five.

New.

§ 464. **Effect of granting a new trial.** — The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument.

New.

§ 465. **In what cases granted.** — The court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

1. When the trial has been had in his absence, if the indictment be for a felony;

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven ;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented ;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors ;

5. When the court has misdirected the jury in a matter of law, or has refused to instruct them as prescribed in section four hundred and twenty ; and the defendant has, at the trial, excepted to such misdirection or refusal ;

6. When the verdict is contrary to law or clearly against evidence ;

7. When it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict ; if such evidence has been discovered since the trial, is not cumulative ; and the failure to produce it on the trial was not owing to want of diligence.

New.

(a) **Improper conduct of jury.** — When, in a capital case after the testimony was closed, a part of the jury, in company with an officer, visited the scene of the homicide, it was held ground for a new trial. (*Eastwood v. People*, 3 Park., 25; 14 N. Y., 562.)

(b) **Effect of withholding evidence.** — A new trial will not be granted because the district attorney by mistake withholds papers in his hands important to defendant, unless the latter used diligence to obtain them. (*People v. Vermilyea*, 7 Cow., 369.) Nor because a co-defendant, tried at the same time, was acquitted and was a material witness for defendant. (*Id*)

(c) **Drawing jurors.** — An irregularity in the drawing of the jury, from which defendant sustained no injury, is not a ground for a new trial. (*People v. Ransom*, 7 Wend., 417.)

(d) **Separation of jury.** — The separation of the jury on the adjournment of a case tried before a court of special sessions, is no ground for a new trial. (*Beebe v. People*, 5 Hill, 32.)

(e) **Id.** — The separation of a jury in a capital case is not *per se* a ground for a new trial. (*People v. Montgomery*, 13 Abb. [N. S.], 207; *Eastwood v. People*, 3 Park., 25.)

(f) **Conversation with jurors, etc.** — Conversation had by a jury with a constable if not prejudicial to the prisoner, not ground for a new trial. (*People v. Hartung*, 4 Park., 256; 17 How., 85; *Wilson v. People*, 4 Park., 619; 8 Abb., 137.)

(g) **Reading newspapers.** — A new trial will not be granted in a capital case merely because the jury read a newspaper containing a report of the trial, but without any comments which would prejudice the prisoner. (*People v. Gaffney*, 14 Abb. [N. S.], 36; 1 Sheld., 304.)

(h) **Defendant must be prejudiced.** — The court will not grant a new trial for a matter which occurred in the presence of the defendant's counsel, by which he could not have been prejudiced. (*Wilson v. People*, 4 Park., 619; 8 Abb., 137.)

(i) **Must be a question of law.** — A new trial will not be granted because the trial judge refused to charge the jury, there being no question of law in the case. (*People v. Gray*, 5 Wend., 289.)

(j) **Judge may correct charge.** — That the judge laid down an erroneous proposition and immediately corrected it, is no ground for a new trial. (*Eggle v. People*, 56 N. Y., 642.)

(k) **Juror asleep.** — It is not a ground for a new trial in a capital case that one of the jurors was apparently asleep, to the knowledge of the prisoner's counsel, who omitted to call the court's attention to it. (*People v. Morrissey*, 1 Sheld., 295.)

(l) **Juror exempt.** — Nor that one of the jurors was exempt from jury service by reason of age. (*Id.*)

(m) **Irregularity in drawing jurors.** — Mere irregularities in drawing grand and petit jurors, unless they prejudice the prisoner, do not furnish grounds for new trial. (*Cox v. People*, 80 N. Y., 500.)

(n) **Only evidence read to be considered.** — If a jury take out with them certain written evidence read in evidence, to which is attached an affidavit not so read, it is ground for a new trial. (*Mitchell's case*, 1 C. H. Rec., 147.)

(o) **Verdict not set aside because witnesses are impeachable.** — Where eight jurors certify that they convicted the prisoner on the evidence of a certain witness, with an affidavit of the prisoner stating that such witness may be successfully impeached, is not a ground for a new trial. (*Houghton and Harvey's case*, 2 C. H. Rec., 73.)

(p) **Surprise or mistake.** — The question whether surprise founded on a mistake of the law is sufficient grounds for a new trial considered. (*People v. O'Brien*, 4 Park., 203.)

(q) **Newly discovered evidence.** — Newly discovered evidence not sufficient unless it appears that it could not have been discovered with proper diligence on the trial. (*People v. Mack*, 2 Park., 673.)

In cases of doubt where the evidence is conflicting and the credibility of witnesses in question, and no error has been committed, a new trial will be denied. (*Id.*)

(r) **Against weight of evidence.** — A new trial may be granted where the verdict is clearly against the weight of evidence. (*Rogers v. People*, 3 Park. Crim., 632; *People v. Shay*, 4 id., 344; *Manuel v. People*, 48 Barb., 548.)

(s) **Irregularities of jury.** — When a new trial is desired on the ground of irregularities of the jurors while in the jury room, affidavits of the jurors cannot be used on the motion. (*Wilson v. People*, 4 id., 619; *People v. Hartung*, 17 How., 85.)

§ 466. (Amended 1882.) **Application, when to be made.** The application for a new trial must be made before judgment except in case of a sentence of death when the application may be made at any time before execution, and in case the court before which the trial was had is not in session so that the application can be made and determined before the execution, then the application may be made to any justice of the supreme court or special term thereof, within the judicial department where the conviction was had.

New.

CHAPTER III.

ARREST OF JUDGMENT.

SECTION 467, Motion in arrest of judgment, defined, and upon what defects founded.

468. Court may arrest judgment without motion.

469. Motion, when and how made.

470. Defendant, when to be held or discharged.

§ 467. (Amended 1882.) **Motion in arrest of judgment, defined, and upon what defects founded.**—A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section three hundred and thirty-one.

New.

(a) **What included in motion to arrest.**—Motion in arrest is not confined to indictment but may include the whole record. (*People v. Bruno*, 6 Park., 657.)

(b) **Variance, etc.**—It cannot bring up a variance between the proof and the indictment. (*People v. Onondaga Gen. Sess.*, 1 Wend., 296; *Case v. People*, 6 Abb. N. C., 151.)

(c) **Mistakes of the court.**—Neither can mistakes of the court on trial, nor of the jury be considered. (*People v. Thompson*, 41 N. Y., 1; *People v. Allen*, 43 id., 28.)

(d) **Motion, how made.**—A motion in arrest of judgment can only be made for defects on the record. (*Jacobowsky v. People*, 6 Hun, 524; 64 N. Y., 659.)

Cannot be made for defect of evidence. (*Id.*)

(e) **Defect of venire.**—A conviction in a capital case without a venire being returned and filed is sufficient ground. (*People v. McKay*, 8 Johns., 212.)

(f) **Irregularity in venire.**—A mere irregularity in the venire no ground. (*People v. Herkimer County, etc.*, 20 id., 810.)

(g) **Limitation of time.**—That the time laid in the indictment is beyond the period of limitation is no ground. (*People v. Van Santford*, 9 Cow., 655.)

(h) **Good and bad counts in an indictment.**—Where an indictment for misdemeanor contains two counts, one good and the other bad, judgment will not be arrested. (*Kane v. People*, 8 Wend., 363; 8 id., 203; *People v. Davis*, 45 Barb., 494; *Frazer v. People*, 54 Barb., 306; *People v. Stein*, 1 Park., 202; *People v. Gilkinson*, 4 id., 26.)

(i) **Effect of good count.**—One good count is sufficient to sustain a conviction. (*People v. Davis*, 56 N. Y., 95.)

§ 468. **Court may arrest judgment without motion.**—The court may also, on its own view of any of these defects, arrest the judgment without motion.

New.

§ 469. **Motion, when and how made.**—The motion must be made before or at the time when the defendant is called for judgment. If made before, it must be on notice to the district attorney, or in his presence.

New.

(a) **Effect of arrest of judgment.**—An arrest of judgment after conviction for a felony is not a bar to a second indictment. (*People v. Casborus*, 13 Johns., 851; *People v. McKay*, 18 id., 212; see *People v. Dowling*, 23 Alb. L. J., 353 [Ct. of App.].)

§ 470. **Defendant, when to be held or discharged.**—When judgment is arrested, and it appears that there is not evidence sufficient to convict the defendant of any crime, he must, if in custody, be discharged; or, if under bail, his bail must be exonerated; or, if money has been deposited instead of bail, it must be refunded; and in such case the arrest of judgment operates as an acquittal of the charge upon which the indictment was found; but if there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be recommitted or admitted to bail anew to answer the new indictment; if there is reasonable ground to believe him guilty of another crime, he must be committed or held to answer therefor; and in no case, when recommitted or held to answer, is the former verdict a bar to a new indictment.

TITLE IX.

OF THE JUDGMENT AND EXECUTION.

CHAPTER I. The judgment.

II. The execution.

CHAPTER I.

THE JUDGMENT.

SECTION 471, 472. Time for pronouncing judgment, to be appointed by the court.

473. In felony, defendant must be present; in misdemeanor, judgment may be pronounced in his absence.

474. When defendant is in custody, how brought before the court for judgment.

475. How brought before the court, when he is on bail.

476. Bench warrant to issue.

477. Form of bench warrant.

478, 479. Service of the bench warrant.

480. Arraignment of defendant for judgment.

481. What cause may be shown against the judgment.

482. If no sufficient cause shown, judgment to be pronounced.

483. Court may summarily inquire into circumstances in aggravation or mitigation of punishment.

484. Judgment to pay fine.

485. The judgment roll.

§ 471. **Time for pronouncing judgment to be appointed by the court.** — After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment be not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment.

New.

§ 472. (Amended 1882.) **Time for pronouncing judgment to be appointed by the court.** — The time appointed must be at least two days after the verdict, if the court intend to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant.

New.

§ 473. **In felony, defendant must be present; in misdemeanor, judgment may be pronounced in his absence.** — For the purpose of judgment, if the conviction be for a felony,

the defendant must be personally present; if it be for a misdemeanor, judgment may be pronounced in his absence.

3 R. S., 1029, § 18; see § 356, *ante*, and cases there cited.

A sentence of corporal punishment cannot be pronounced in the absence of the defendant. (*People v. Winchell*, 7 Cow., 523.)

Otherwise not necessary to be present. (*Son v. People*, 12 Wend., 344.)

§ 474. When defendant is in custody, how brought before the court for judgment. — When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment; and the officer must do so accordingly.

New.

§ 475. How brought before the court when he is on bail. If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment, when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

New.

§ 476. Bench warrant to issue. — The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties.

New.

§ 477. Form of bench warrant. — The bench warrant must be substantially in the following form :

“County of *Albany*, [or as the case may be.]

“In the name of the people of the State of New
[SEAL.] York — To any sheriff, constable, marshal or policeman in this state. A. B. having been on the
day of _____, 18____, duly convicted in the *court of sessions of the county of Albany* [or as the case may be], of the crime of [designating it generally].

“You are therefore commanded, forthwith to arrest the above-named A. B., and bring him before that court for judgment; or if the court have adjourned for the term, you are to deliver him into the custody of the sheriff of the county of *Albany* [or

"City of *Albany*, [or as the case may be] the day of
 , 18

"E. F., *Clerk.*"

As to requisite and sufficiency of warrant, see §§ 151, *et seq.*, and cases there cited.

New.

New.

New.

(b) In cases of misdemeanors. — Held otherwise in other than felonies. (*People v. McGeery*, 6 Park., 658; *Hildebrand v. People*, 1 Hun, 19; 3 S. C., 702; 56 N. Y., 394.)

1. That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity must be tried as provided by this Code.

If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment;

2. That he has good cause to offer, either in arrest of judgment, or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

New. (See § 496, *post*, *et seq.*)

§ 482. **If no sufficient cause shown, judgment to be pronounced.**—If no sufficient cause be alleged, or appear to the court, why judgment should not be pronounced, it must thereupon be rendered.

New.

(a) **Court may not suspend judgment indefinitely.**—The court has no power to suspend judgment indefinitely on a plea of guilty. (*People v. Morrisette*, 20 How., 118.)

On a plea of guilty the court may give a general judgment, applicable to any count. (*Polinsky v. People*, 11 Hun, 890; 78 N. Y., 65.)

(b) **Court may sentence for highest offense.**—Under a general verdict of guilty, the court may sentence for the highest offense charged in the indictment. (*Hawker v. People*, 75 N. Y., 487.)

§ 483. **Court may summarily inquire into circumstances in aggravation or mitigation of punishment.**—After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the suggestion of either party, that there are circumstances, which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time, and upon such notice to the adverse party as it may direct.

New. After a conviction for assault and battery, the court will receive affidavits in mitigation or aggravation of punishment. (*Hagerman's case*, 8 C. H. Rec., 73; *People v. Vermilyea*, 7 Cow., 108.)

§ 484. **Judgment to pay fine.**—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment; which cannot exceed one day for every one dollar of the fine.

Laws 1876, ch. 61.

(a) **Pay or stand committed.**— A judgment that the defendant pay a fine and an award of process for its recovery is good, without adding that the prisoner stand committed until payment. (*Kane v. People*, 8 Wend., 203.)

§ 485. **The judgment roll.**— When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment roll:

1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decision thereon;

2. The indictment and a copy of the minutes of the plea or demurrer;

3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon;

4. A copy of the minutes of the trial;

5. A copy of the minutes of the judgment;

6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment;

7. The bill of exceptions, if there be one.

New.

CHAPTER II.

THE EXECUTION.

SECTION 486. Authority for the execution of a judgment, except of death.

487. Commitment of the defendant.

488. Judgment of imprisonment; by whom and how executed.

489. Duty of sheriff.

490. Duty of sheriff.

§ 486. **Authority for the execution of a judgment, except of death.**— When a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it

is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.

3 R. S., 1034, § 18.

§ 487. Commitment of the defendant. — If the judgment be imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with.

Id., § 14.

§ 488. Judgment of imprisonment; by whom and how executed. — When the judgment is imprisonment in a county jail, or a fine and that the defendant be imprisoned until it be paid, the judgment must be executed by the sheriff of the county. In all other cases, when the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment.

New.

§ 489. Duty of sheriff. — If the judgment be imprisonment, except in a county jail, the sheriff must deliver a copy of the entry of the judgment upon the minutes of the court, together with the body of the defendant, to the keeper of the prison, in which the defendant is to be imprisoned.

New.

§ 490. Duty of sheriff. — The sheriff or his deputy, while conveying the defendant to the proper prison, in execution of a judgment of imprisonment, has the same authority to require the assistance of any citizen of this state, in securing the defendant, and in retaking him if he escape, as if the sheriff were in his own county; and every person who refuses or neglects to assist the sheriff, when so required, is punishable, as if the sheriff were in his own county.

3 R. S., 1035, § 15; 1 R. L., 275, §§ 16, 17; see §§ 102, 104 *ante*, and cases there cited.

TITLE X.

GENERAL PROVISIONS IN RELATION TO THE PUNISHMENT
OF CRIMES.

CHAPTER I. The death penalty.

II. Second offenses, habitual criminals, and special penal discipline.

CHAPTER I.

THE DEATH PENALTY.

SECTION 491. Warrant for execution of convict.

492. Time of execution.

493. Judge must transmit certain papers to governor.

494. Governor may consult judges, etc.

495. Governor only to reprieve, etc., except as provided in the following sections.

496. If convict becomes insane, sheriff to impanel jury.

497. Duty of district attorney.

498. Inquisition; suspension of execution.

499. Sheriff to transmit inquisition to governor; governor's duty.

500. If female convict is pregnant, sheriff to impanel jury of physicians.

501. Inquisition; suspension of execution.

502. Sheriff to transmit inquisition to governor; governor's duty.

503. When day of execution has passed, convict to be brought up by warrant.

504. Court to inquire, etc.; when to direct execution.

505. Death penalty; mode of infliction.

506. Death penalty; where inflicted.

507. Death penalty; who to be present.

508. Death penalty; certificate after execution.

509. Death penalty; when inflicted by sheriff in an adjoining county.

§ 491. **Warrant for execution of convict.**—When a defendant is sentenced to the punishment of death, the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county, a warrant, stating the conviction and sentence, and appointing the day upon which the sentence must be executed.

8 R. S., 929, § 11.

§ 492. **Time of execution.** — The day so appointed must be not less than four weeks and not more than eight weeks after the sentence.

Id., 12.

(a) **Effect of previous sentence.** — A prisoner may be executed under a capital sentence before the expiration of a previous sentence of imprisonment. (*Thomas v. People*, 67 N. Y., 218.)

(b) **When prisoner escapes.** — When a prisoner escapes before the expiration of his term of imprisonment, no new award of execution is necessary or proper; he may be retaken and confined under the authority of the original judgment. (*Haggerty v. People*, 53 N. Y., 476; reversing 6 Lana., 832.)

(c) **Supreme court to fix time.** — When judgment of death has not been executed pursuant to the sentence, the supreme court having the convict brought before them, may issue their warrant to the sheriff to do execution upon the sentence at a time therein fixed. (*Ex parte Ferris*, 35 N. Y., 262; 32 How., 411.)

(d) **After respite.** — Where the execution of a convict is respited, it is the duty of the sheriff to execute the sentence on the day to which the execution is respited. (*People v. Enoch*, 13 Wend., 159.)

§ 493. **Judge must transmit certain papers to governor.** The judge, presiding at the term at which the conviction took place, must immediately thereupon transmit to the governor a statement of the conviction and sentence, with the notes of testimony taken upon the trial by him or the notes, written out, taken by a stenographer or assistant stenographer, attending the court or term pursuant to law.

Id., § 18; Laws 1847, ch. 328, § 1.

§ 494. **Governor may consult judges, etc.** — The governor is authorized to require the opinion of the judges of the court of appeals, justices of the supreme court, and the attorney-general, or of any of them, upon a statement so furnished.

Id., § 14; Laws 1847, ch., 328, § 1.

§ 595. **Governor only to reprieve, etc., except as provided in the following sections.** — No judge, court, or officer, other than the governor, can reprieve or suspend the execution of a defendant sentenced to the punishment of death, except where a sheriff is authorized so to do, in a case and in the manner prescribed in the following sections of this chapter. This section does not apply to a stay of proceedings upon an appeal or writ of error.

Id., § 15.

§ 496. If convict becomes insane, sheriff to impanel jury. — If, after a defendant has been sentenced to the punishment of death, there is reasonable ground to believe that he has become insane, the sheriff of the county in which the conviction took place, with the concurrence of a justice of the supreme court, or the county judge of the county, who may make an order to that effect, must impanel a jury of twelve persons of that county, qualified to serve as jurors in a court of record, to examine the question of the sanity of the defendant. The sheriff must give at least seven days' notice of the time and place of the meeting of the jury to the district attorney of the county. Section one hundred and eight of the Code of Civil Procedure regulates the impanneling of such a jury, and the proceedings upon the inquisition so far as it is applicable.

Id., § 16; Laws 1847, ch., 328, § 3.

§ 497. Duty of district attorney. — The district attorney must attend the inquiry. He may produce witnesses before the jury; for which purpose he has the same power to issue subpoenas, as for witnesses to attend a grand jury, and disobedience thereto may be punished by the court of oyer and terminer for that county, at any term thereof, in the same manner as disobedience to process issued by that court.

3 R. S., 929, § 17.

§ 498. Inquisition ; suspension of execution. — The inquisition of the jury must be signed by the jurors and the sheriff. If it be found by the inquisition that the defendant is insane, the sheriff must suspend execution of the warrant directing the defendant's death, until he receives a warrant from the governor, directing that the defendant be executed.

Id., § 18.

§ 499. Sheriff to transmit inquisition to governor; governor's duty. — The sheriff must immediately transmit the inquisition to the governor, who, as soon as he is satisfied of the sanity of the defendant, or of his restoration to sanity, must issue his warrant, appointing a time and place for the execution of the latter, pursuant to his sentence, unless the sentence is commuted or the convict pardoned, and may in the meantime give directions for the disposition and custody of the defendant.

Id., § 19.

§ 500. If female convict is pregnant, sheriff to impanel jury of physicians. — If there is reasonable ground to believe that a female defendant, sentenced to the punishment of death, is pregnant, the sheriff of the county where the conviction took place must impanel a jury of six physicians to inquire into her pregnancy. Sections four hundred and ninety-seven and four hundred and ninety-eight of this Code apply to the proceedings upon the inquisition, except that the sheriff may, in his discretion, require one or more of the physicians composing the jury to attend from an adjoining county. A physician acting as a juror upon such an inquisition, need not be qualified to serve as a juror in a court of record.

Id., § 20.

§ 501. Inquisition ; suspension of execution. — The inquisition of the jury must be signed by the jurors and the sheriff. If it is found by the inquisition that the defendant is quick with child, the sheriff must suspend the execution of the warrant directing her execution until he receives a warrant from the governor directing that the convict be executed.

Id., §§ 20, 21, 22.

§ 502. Sheriff to transmit inquisition to governor ; governor's duty. — The sheriff must immediately transmit the inquisition to the governor, who, as soon as he is satisfied that the defendant is no longer quick with child, may issue his warrant, appointing a time and place for her execution, pursuant to her sentence, or may commute her punishment to imprisonment for life.

Id., §§ 21, 22.

§ 503. When day of execution has passed, convict to be brought up by warrant. — Whenever, for any reason, other than insanity or pregnancy, a defendant, sentenced to the punishment of death, has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or the judgment inflicting the punishment stands in full force, the supreme court, or a justice thereof, upon application by the attorney general, or of the district attorney of the county where the conviction was had, must make an order, directed to the sheriff, commanding him to bring the convict before a general term of the supreme

court in the department, or a term of a court of oyer and terminer in the county where the conviction was had. If the defendant be at large, a warrant may be issued by the supreme court, or a justice thereof, directing any sheriff or other officer to bring the defendant before the supreme court at a general term thereof, or before a term of the court of oyer and terminer in that county.

Id., § 28.

(a) **Supreme court may reappoint day.** — When judgment of death has not been executed pursuant to the sentence, the supreme court having the convict brought before them may issue their warrant to the sheriff to do execution upon the sentence at a time therein fixed. (*Ex parte Ferris*, 35 N. Y., 262; 32 How., 411.)

§ 504. Court to inquire, etc.; when to direct execution.

Upon the defendant being brought before the court, it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant to the sheriff of the proper county, under the hands of the judge or judges, or of a majority of them, of whom the judge presiding must be one, commanding the sheriff to do execution of the sentence, upon a day appointed therein. The warrant must be obeyed by the sheriff accordingly.

3 R. S., 929, § 24.

§ 505. Death penalty; mode of infliction. — The punishment of death must in every case be inflicted by hanging the convict by the neck until he is dead.

3 R. S., 930, § 25.

§ 506. Death penalty; where inflicted. — The punishment of death must be inflicted within the walls of the prison of the county in which the conviction of the person sentenced took place, or within a yard or inclosure adjoining thereto. For the purposes of this section, the "prison" is defined to be the jail appointed by law for the confinement of convicts awaiting execution of their sentence.

Id., § 26; Laws 1885, ch. 258, § 1.

§ 507. Death penalty; who to be present. — It is the duty of the sheriff or under sheriff of the county to be present at the execution, and to invite the presence, by at least three days' previous notice, of the county judge, district attorney, clerk and

surrogate of the county, together with two physicians and twelve reputable citizens of full age, to be selected by the sheriff or under sheriff. The sheriff or under sheriff must, at the request of the criminal, permit such ministers of the gospel, priests or clergymen of any religious denomination, not exceeding two, and such of the immediate relatives of the convict as he desires, being of full age, to be present at the execution; and such officers of the prison, deputy sheriffs, and constables or marshals must attend, as the sheriff or under sheriff deems expedient to have present. Besides the persons designated in this section, no one shall be permitted to be present at the execution.

§ R. S., 930, § 27; Laws 1835, ch. 258, § 2.

§ 508. Death penalty; certificate after execution.—The sheriff or under sheriff attending the execution must prepare and sign a certificate, setting forth the time and place thereof, and that the convict was then and there executed, in conformity to the sentence of the court, and the provisions of this Code, and must procure the certificate to be signed by the county judge, surrogate and district attorney, if they were present, and by the physicians and citizens selected by the sheriff who witnessed the execution. He must cause the certificate to be filed in the office of the clerk of the county.

Id., § 28; Laws 1835, ch. 258, § 3.

§ 509. Death penalty; when inflicted by sheriff in an adjoining county.—If in any county there is not a county jail for the confinement of criminal prisoners, or the jail has become unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the county judge of the county has, according to law, designated the jail of a contiguous county for the confinement of the prisoners of the county, the sheriff of the county in which a convict sentenced to death is confined must attend, upon the day appointed for the execution of the sentence, at the jail of his county, and there conduct the proceedings and execute the sentence, in all respects as if the jail were situated in the county where the conviction took place.

Id., § 29; Laws 1846, ch. 118; Laws 1847, ch., 280.

CHAPTER II.

SECOND OFFENSES, HABITUAL CRIMINALS AND SPECIAL PENAL
DISCIPLINE.

SECTION 510. When convict may be adjudged an habitual criminal.

511. Judgment accordingly, how entered, etc.

512. Persons so adjudged when liable to arrest and punishment.

513. Persons so adjudged when liable to arrest and punishment;
evidence of character on subsequent trial.

514. Persons so adjudged when liable to arrest and punishment;
always liable to search, etc.

§ 510. **When convict may be adjudged an habitual criminal.**—When a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state of any other crime, he may be adjudged by the court, in addition to other punishment inflicted upon him, to be an habitual criminal. A person convicted of a misdemeanor, who has been already five times convicted in this state of a misdemeanor may be adjudged by the court in addition to, or instead of, other punishment, to be an habitual criminal.

Laws 1873, ch. 357; see Penal Code, §§ 690, 691, 692.

(a) **Second offense.**—To justify the sentence to an increased punishment for a second offense the second offense must have been committed after conviction for the first. (*People v. Butler*, 3 Cow., 847.)

First conviction must have been in this state. (*People v. Caesar*, 1 Park., 645.)

The act of 1873 is constitutional. (*People v. McCarthy*, 45 How., 97.)

(b) **Twice in jeopardy.**—Nor does it violate the constitutional provision that "no person shall be put twice in jeopardy." (*Id.*)

§ 511. **Judgment accordingly, how entered, etc.**—The judgment specified in the last section must be entered in a separate book, kept for that purpose. A copy of the entry, duly certified by the clerk of the court, is proof of the judgment, and a copy, so certified, must be forthwith transmitted to the police department of each city, and to the district attorney of each county in the state.

New.

§ 512. **Persons so adjudged when liable to arrest and punishment.**—A person who has been adjudged an habitual criminal is liable to arrest summarily with or without warrant, and to punishment as a disorderly person, when he is found with-

out being able to account therefor, to the satisfaction of the court or magistrate, either,

1. In possession of any deadly or dangerous weapon, or of any tool, instrument or material, adapted to, or used by criminals for, the commission of crime; or

2. In any place or situation, under circumstances giving reasonable ground to believe that he is intending or waiting the opportunity to commit some crime.

New.

(a) **No jury trial.** — A person arrested under this section is not entitled to a jury trial. (*People v. McCarthy*, 45 How., 97.)

§ 513. Persons so adjudged when liable to arrest and punishment; evidence of character on subsequent trial. A person who, having been adjudged an habitual criminal, is charged with a crime committed thereafter, may be described in the complaint, warrant or indictment therefor, as an habitual criminal; and, upon proof that he has been adjudged to be such, the prosecution may introduce, upon the trial or examination, evidence as to his previous character, in the same manner and to the same extent as if he himself had first given evidence of his character and put the same in issue.

New.

§ 514. Persons so adjudged when liable to arrest and punishment; always liable to search, etc. — The person and the premises of every one who has been convicted and adjudged an habitual criminal shall be liable at all times to search and examination by any magistrate, sheriff, constable, or other officer, with or without warrant.

New.

(a) **Forcible examination of female.** — Forcible examination of the person not allowable in case of female prisoner in certain cases. (*People v. McCoy*, 45 How., 216.)

TITLE XI.

OF APPEALS.

- CHAPTER I. Appeals, when allowed, and how taken.
II. Dismissing an appeal for irregularity.
III. Argument of the appeal.
IV. Judgment upon appeal.

CHAPTER I.

APPEALS, WHEN ALLOWED, AND HOW TAKEN.

- SECTION 515. Writs of error and of *certiorari* abolished; appeal substituted.
516. Parties, how designated on appeal.
517. In what cases appeal may be taken by defendant.
518. In what cases by the people.
519. In what cases generally.
520. Appeal, a matter of right.
521. Must be taken within one year after judgment.
522-525. Appeal, how taken.
526. Appeal by the people, not to stay or affect the judgment until reversed.
527. Stay of proceedings, on appeal to supreme court from judgment of conviction.
528. Stay, upon appeal to court of appeals from judgment of supreme court, affirming judgment of conviction.
529. Certificate of stay not to be granted, but on notice to district attorney.
530, 531. Effect of the stay.
532. Transmitting the papers to the appellate court.

§ 515. **Writs of error and of *certiorari* abolished; appeal substituted.** — Writs of error and of *certiorari*, in criminal actions, as they have heretofore existed, are abolished; and hereafter the only mode of reviewing a judgment or order in a criminal action is by appeal.

New.

§ 516. **Parties, how designated on appeal.** — The party appealing is known as the appellant, and the adverse party as the respondent. But the title of the action is not changed in consequence of the appeal.

New.

§ 517. **In what cases appeal may be taken by defendant.** An appeal to the supreme court may be taken by the defendant

from the judgment on a conviction after indictment, and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment roll, as prescribed by section four hundred and eighty-five, may be reviewed.

New.

The court has no authority on questions arising on the trial of an indictment except such as is given by statute. In order to present the point relied upon as error an exception must be taken. (*Shufflin v. People*, 4 Hun, 16.)

§ 518. (Amended 1882.) **In what cases by the people.** — An appeal to the supreme court may be taken by the people in the following cases, and no other :

1. Upon a judgment for the defendant, on a demurrer to the indictment ;
2. Upon an order of the court arresting the judgment.

Laws 1879, ch. 176; Laws 1880, ch. 538.

A new trial cannot be granted when defendant has been acquitted of a felony. (*People v. Comstock*, 8 Wend., 549; *People v. Corning*, 2 N. Y., 9.)

§ 519. **In what cases generally.** — An appeal may be taken from the judgment of the supreme court to the court of appeals in the following cases, and no other :

1. From a judgment affirming or reversing a judgment of conviction ;
2. From a judgment affirming or reversing a judgment for the defendant, on a demurrer to the indictment, or on an order of the court arresting the judgment ;
3. From a final determination affecting the substantial right of a defendant.

New.

(a) **Criminal causes preferred.** — Criminal causes are preferred. (Rule 11, Ct. of App., and first in order rule 20, Ct. of App.; Code Civil Pro., § 790.)

§ 520. **Appeal in matter of right.** — All appeals provided for in this chapter may be taken as a matter of right.

New.

§ 521. **Must be taken within one year after judgment.** An appeal must be taken within one year after the judgment was rendered.

New.

§ 522. **Appeal, how taken.** — An appeal must be taken by the service of a notice in writing on the clerk with whom the judgment roll is filed, stating that the appellant appeals from the judgment.

New.

§ 523. **Appeal, how taken.** — If the appeal be taken by the defendant a similar notice must be served on the district attorney of the county in which the original judgment was rendered.

New.

§ 524. **Appeal, how taken.** — If it be taken by the people, a similar notice must be served on the defendant, if he be a resident of, or imprisoned in the city or county; or if not, on the counsel, if any, who appeared for him on the trial, if he reside or transact his business in the county. If the service cannot, after due diligence, be made, the appellate court, upon proof thereof, may make an order for the publication of the notice, in such newspaper, and for such time as it deems proper.

New.

§ 525. **Appeal, how taken.** — At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal becomes perfected.

New.

§ 526. **Appeal by the people, not to stay or affect the judgment until reversed.** — An appeal taken by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed.

New.

§ 527. (Amended 1882.) **Stay of proceedings, on appeal to supreme court from judgment of conviction.** — An appeal to the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing with the notice of appeal a certificate of the judge who presided at the trial, or of a judge of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise, except that when the judgment is of death the appeal stays the exe-

cution, of course, until the determination of the appeal. And the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

(a) **Probable cause of error.** — In determining whether a writ of error and stay of proceedings should be granted to enable the prisoner to appeal, it is not necessary for the justice to whom the application is made should arrive at the positive conclusion that the court erred in law. (*People v. Hendrickson*, 1 Park., 396; 1 id., 347; *People v. Lohman*, 2 Barb., 450.)

(b) **Id.** — Enough if the judge to whom application is made has a reasonable doubt as to the correctness of the law. (*People v. Hendrickson*, 1 Park., 396; *People v. Lohman*, 2 Barb., 450; *People v. Folmsbee*, 60 Barb., 480.)

(c) **Gravity of the crime to be considered.** — Greater latitude should be allowed in granting certificate for appeal in capital cases than otherwise. (*People v. O'Reilly*, 61 How., 18.)

§ 528. (Amended 1882.) **Stay, upon appeal to court of appeals from judgment of supreme court, affirming judgment of conviction.** — An appeal to the court of appeals, from a judgment of the supreme court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the court of appeals or of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise, except that when the judgment is of death the appeal stays the execution of course until the determination of the appeal.

3 R. S., 1030, § 29.

§ 529. **Certificate of stay not to be granted, but on notice to district attorney.** — The certificate mentioned in the last two sections cannot, however, be granted upon an appeal on a conviction of felony, until such notice as the judge may prescribe has been given to the district attorney of the county where the conviction was had, of the application for the certificate. But the judge may stay the execution of the judgment in the meantime.

New.

§ 530. **Effect of the stay.** — If the certificate, provided in sections five hundred and twenty-seven and five hundred and twenty-eight, be given, the sheriff must, if the defendant be in his custody, upon being served with a copy of the order, keep the

defendant in his custody, without executing the judgment, and detain him to abide the judgment upon the appeal.

New.

§ 531. **Effect of the stay.** — If, before the granting of the certificate, the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody.

New.

§ 532. **Transmitting the papers to the appellate court.** — Upon the appeal being taken, the clerk, with whom the notice of appeal is filed, must, within ten days thereafter, without charge, transmit a copy of the notice of appeal and of the judgment roll, as follows :

1. If the appeal be to the supreme court, to the clerk of that court, where the next general term in the district is to be held ;
2. If it be to the court of appeals, to the clerk of that court.

New.

Application to amend return should be made to the court where judgment was rendered. (*Beid v. Barker*, 2 Cow., 408; Rule 3, Ct. App.)

CHAPTER II.

DISMISSING AN APPEAL FOR IRREGULARITY.

SECTION 533. For what irregularity, and how dismissed.

534. Dismissal for want of return.

§ 533. **For what irregularity, and how dismissed.** — If the appeal be irregular in a substantial particular, but not other wise, the court may, on any day in term, on motion of the respondent, upon five days' notice, served with copies of the papers on which the motion is founded, order it to be dismissed.

3 R. S., 654, § 9.

§ 534. **Dismissal for want of return.** — The court may also, upon like motion, dismiss the appeal, if the return be not made, as provided in section five hundred and thirty-two, unless for good cause they enlarge the time for that purpose.

3 R. S., 654, § 10.

CHAPTER III.

ARGUMENT OF THE APPEAL.

SECTION 535. Appeal to supreme court, how and where brought to argument.

536. Appeal to court of appeals, how brought to argument.

537. Notice of argument to counsel for defendant.

538. Papers, by whom furnished, and effect of omission.

539. Judgment of affirmance may be without argument, if appellant fail to appear; reversal, only upon argument, though respondent fail to appear.

540. Number of counsel to be heard; defendant's counsel to close the argument.

541. Defendant need not be present.

§ 535. **Appeal to supreme court, how and where brought to argument.**—An appeal to the supreme court may be brought to argument by either party, on ten days' notice, on any day, at a general term held in the district in which the original judgment was given.

New.

(a) **Preference given to criminal cases.**—Appeals and other proceedings in criminal cases are entitled to preference. (Code of Civil Pro., § 790.) They may be heard on any day in term. (Sup. Ct., 48.)

(b) **Must be noticed.**—A criminal case cannot be moved out on the calendar without notice of intention so to do. (*Barron v. People*; 1 Barb., 136.)

§ 536. **Appeal to court of appeals, how brought to argument.**—An appeal to the court of appeals may, in the same manner, be brought to argument by either party, on any day in term.

New.

§ 537. **Notice of argument to counsel for defendant.**—If a counsel, within five days after the appeal, have given notice to the district attorney, that he appears for the defendant, notice of argument must be served on him, instead of the defendant; otherwise, notice must be served as the court may direct.

New.

§ 538. **Papers, by whom furnished, and effect of omission.**—When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment roll. If he fail to do so, the appeal must be dismissed, unless the court otherwise direct.

New. (Sup. Ct. Rule 41.)

§ 539. Judgment of affirmance may be without argument, if appellant fail to appear; reversal, only upon argument, though respondent fail to appear. — Judgment of affirmance may be given, without argument, if the appellant fail to appear. But judgment of reversal can only be given upon argument, though the respondent fail to appear.

New. (Ct. App. Rule 15; see, also, *Barrow v. People*, 1 Barb., 186; also Ct. App. Rule 21.)

§ 540. Number of counsel to be heard; defendant's counsel to close the argument. — Upon the argument of the appeal, if the crime be punishable with death, two counsel on each side must be heard if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side. The counsel for the defendant is entitled to the closing argument.

New.

§ 541. Defendant need not be present. — The defendant need not personally appear in the appellate court.

New.

The personal presence of the defendant is not necessary on the argument or at the decision in an appellate court. (*People v. Clark*, 1 Park., 360.)

(a) Nor on motion to quash. — On a motion to quash it is not necessary that the defendant should be present in court during the argument. (*People v. Vasl*, 57 How., 81; 6 Abb. N. C., 206.)

CHAPTER IV.

JUDGMENT, UPON APPEAL.

SECTION 542. Court to give judgment, without regard to technical errors, defects or exceptions, not affecting substantial rights.

543. May reverse, affirm or modify the judgment, and order a new trial.

544. New trial.

545. Defendant to be discharged on reversal of judgment against him, where new trial is not ordered.

546. Judgment to be executed, on affirmance against the defendant.

547. Judgment of appellate court, how entered and remitted.

548. Papers returned, not to be remitted.

549. Jurisdiction of appellate court ceases, after judgment remitted.

§ 542. **Court to give judgment without regard to technical errors, defects or exceptions, not affecting substantial rights.** — After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

New.

(a) **Formal defects unimportant.** — A conviction will not be reversed on error for a formal defect in the indictment in no way prejudicial to the prisoner. (*Schrumpf v. People*, 14 Hun, 10.)

(b) **Illegal evidence ground of new trial.** — Illegal evidence which may have prejudiced the prisoner is ground for a new trial. (*Lambert v. People*, 6 Abb. N. C., 181.)

(c) **Must be on exception.** — There must be an exception to bring up the question for review in any event. (*Brotherton v. People*, 75 N. Y., 159.)

(d) **Must be actually prejudicial.** — Mere irregularity in the drawing of grand and petit jurors not ground for reversing conviction, actually prejudicial to the prisoner. (*Cox v. People*, 80 N. Y., 500; *People v. Ransom*, 7 Wend., 417; *Eastwood v. People*, 3 Park., 25; *People v. Montgomery*, 13 Abb., 207.)

(e) **Id.** — The error complained of must have been actually prejudicial to the prisoner. (*People v. Ransom*, 7 Wend., 417; *Eastwood v. People*, 3 Park., 25; *People v. Montgomery*, 13 Abb., 207; *Beebe v. People*, 5 Hill, 32; *People v. Hartung*, 4 Park., 256; 17 How., 85; *Wilson v. People*, 4 Park., 619; 8 Abb., 137; *People v. Gaffney*, 14 Abb., 86; *People v. Gray*, 5 Wend., 289; *Eggle v. People*, 56 N. Y., 642.)

§ 543. **May reverse, affirm or modify the judgment, and order a new trial.** — Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, correct the judgment to conform to the verdict; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal may, if necessary or proper, order a new trial.

New. A judgment may be reversed in part and affirmed as to the residue. (*Bradshaw v. Callaghan*, 8 Johns., 558.)

§ 544. **New trial.** — When a new trial is ordered, it shall proceed in all respects as if no trial had been had.

New.

§ 545. **Defendant to be discharged on reversal of judgment against him, where new trial is not ordered.** — If a judgment against the defendant be reversed, without ordering a new trial, the appellate court must direct, if he be in custody,

that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant.

New.

§ 546. (Amended 1882.) **Judgment to be executed, on affirmance against the defendant.** — On a judgment of affirmance against the defendant, the original judgment must be carried into execution as the appellate court may direct, and if the defendant be at large, a bench warrant may be issued for his arrest. If a judgment be corrected, the corrected judgment must be carried into execution as the appellate court may direct.

New.

§ 547. **Judgment of appellate court, how entered and remitted.** — When the judgment of the appellate court is given, it must be entered in the judgment book, and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days.

New. (See Ct. App. Rule 21; also Ct. App. Rule 15.)

§ 548. **Papers returned not to be remitted.** — The papers returned to the appellate court must there remain of record, and are not to be remitted to the court below.

New.

§ 549. **Jurisdiction of appellate court ceases, after judgment remitted.** — After the certificate of the judgment has been remitted, as provided in section five hundred and forty-seven, the appellate court has no further jurisdiction of the appeal, or of the proceedings thereon; and all orders, which may be necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed.

New.

TITLE XII.

OF MISCELLANEOUS PROCEEDINGS.

CHAPTER I. Bail.

- II. Compelling the attendance of witnesses.
- III. Examination of witnesses, conditionally.
- IV. Examination of witnesses, on commission.
- V. Inquiry into the insanity of the defendant, before or during the trial, or after conviction.
- VI. Compromising certain crimes, by leave of the court.
- VII. Dismissal of the action, before or after the indictment for want of prosecution or otherwise.
- VIII. Remitting the punishment, in certain cases.
- IX. Proceedings against corporations.
- X. Entitling affidavits.
- XI. Errors and mistakes, in pleadings and other proceedings.
- XII. Disposal of property, stolen or embezzled.
- XIII. Reprieves, commutations and pardons.

CHAPTER I.

BAIL.

ARTICLE I. In what cases the defendant may be admitted to bail.

- II. Bail, upon being held to answer, before indictment.
- III. Bail, upon an indictment, before conviction.
- IV. Bail, upon an appeal.
- V. Deposit, instead of bail.
- VI. Surrender of the defendant.
- VII. Forfeiture of the undertaking of bail, or of the deposit of money.
- VIII. Re-commitment of the defendant, after having given bail, or deposited money instead of bail.

ARTICLE I.

IN WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

SECTION 550. Admission to bail, defined.

- 551. Taking bail, defined.
- 552. Offenses not bailable.
- 553. In what cases defendant may be admitted to bail, before conviction.
- 554. In what cases he may be admitted to bail, after conviction and upon appeal.
- 555. Nature of bail before conviction.
- 556. Nature of bail after conviction and upon appeal.

§ 550. **Admission to bail, defined.**— When the defendant is held to appear for examination, bail for such appearance may be taken either,

1. By the magistrate who issued the warrant or before whom the same is returnable; or,
2. By any judge of the supreme court.

3 R. S., 1001, § 81.

§ 551. **Taking bail, defined.**— The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the people of this state a specified sum.

New. (See U. S. Const., eighth amendment; N. Y. State Const., art. I, § 5.)

(a) **Power to take bail incident to right to hear and determine.**— The power to admit to bail is incident to the right to hear and determine the offense. (*People v. Van Horne*, 8 Barb., 158; *People v. Goodwin*, 1 Wheel. C. C., 484; *People v. Shattuck*, 6 Abb. N. C., 38.)

(b) **At common law.**— The right of bail existed at common law. (*People v. Huggins*, 10 Wend., 465.)

§ 552. (Amended 1882.) **Offenses not bailable.**— The defendant cannot be admitted to bail except by a judge of the supreme court or by a court of oyer and terminer where he is charged,

1. With a crime punishable with death, or
2. With the infliction of a probably fatal injury upon another, and under such circumstances as that, if death ensue, the crime would be murder.

New.

(a) **In murder cases.**— If facts do not sustain the charge of murder contained in a warrant, bail may be allowed. (*People v. Sheriff of Westchester*, 1 Park., 159; 10 N. Y. Leg. Obs., 298; *People v. Porter*, 8 Barb., 168, n.)

(b) **Manslaughter.**— In a case of manslaughter where there is no reasonable doubt of the prisoner's guilt, bail will not be allowed. (*Ex parte Taylor*, 5 Cow., 39.)

(c) **Capital case.**— Even in a capital case bail ought to be allowed, unless the proof be evident and the presumption great. (*People v. Perry*, 8 Abb., 27; *People v. Hyler*, 2 Park., 570; *People v. Van Horne*, 8 Barb., 158; *People v. Cole*, 6 Park., 695; 4 Abb. [N. S.], 280.)

Case has been twice tried.— That a case has been twice in both cases disagreed, presents a proper case for admitting *Perry*, 8 Abb., 27.)

(e) **Case of homicide.** — On a question of bail in a case of homicide the court will look into the examination taken before the coroner. (*People v. Beigler*, 3 Park., 316.)

(f) **Must make a prima facie case.** — Should be admitted to bail even in a capital case after indictment, if the evidence be not such as to make out a *prima facie* case of guilt. (*People v. Baker*, 10 How., 567.)

(g) **Probable cause of guilt.** — In a capital case a prisoner committed by a regular inquisition of a coroner's jury, if it appear that there is probable cause of guilt, will not be bailed. (*People v. Collins*, 20 How., 111; 11 Abb., 106.)

(h) **Id.** — In a capital case, after a bill found, the prisoner will not be admitted to bail where it is believed the evidence would warrant a conviction. (*People v. Shattuck*, 6 Abb. N. C., 88.)

§ 553. **In what cases defendant may be admitted to bail, before conviction.** — If the charge be for any other crime, he may be admitted to bail, before conviction, as follows :

1. As a matter of right, in cases of misdemeanor ;
2. As a matter of discretion, in all other cases.

New.

(a) **May be admitted ex parte.** — The supreme court has power to admit to bail on a charge of felony. (*Ex parte Tayloe*, 5 Cow., 89.)

(b) **Bail not a matter of course in felony.** — It is not a matter of course to bail a prisoner committed on the charge of felony above the degree of petit larceny; some cause must be shown. (*Goodwin's case*, 5 C. H. Rec. 11; *People v. Van Horne*, 8 Barb., 156; *People v. Restell*, 3 How., 251.)

(c) **Not a matter of right.** — In cases of felony bail is not a matter of right; after indictment found the court will not look into depositions taken before the committing magistrate. (*People v. Dixon*, 4 Park., 651, 3 Abb., 395.)

(d) **May be bailed pending an appeal.** — One convicted of misdemeanor and sentenced to prison may be bailed pending an appeal. (*People v. Folmsbee*, 60 Barb., 480.)

§ 554. (Amended 1882.) **In what cases he may be admitted to bail, after conviction and upon appeal.** — Before conviction, a defendant may be admitted to bail :

1. For his appearance before the magistrate on the examination of the charge, before being held to answer ;
2. To appear at the court to which the magistrate is required by section two hundred and twenty-one to return the depositions and statements upon the defendant being held to answer after examination ;
3. After indictment either upon the bench warrant issued for his arrest or upon an order of the court committing him or enlarg-

ing the amount of bail, or upon his being surrendered by his bail, to answer the indictment in the court in which it is found, or to which it may be sent or removed for trial. And any captain or sergeant of police in any city or village of this state may take bail for appearance before a competent and accessible magistrate the next morning from any person arrested for a misdemeanor between two o'clock in the afternoon and eight o'clock the next morning, if a magistrate competent to take the bail be not found within an hour after the arrest. When such captain or sergeant of police takes bail he must take it by an undertaking in the form in this section mentioned, executed in his presence by the defendant and at least one surety who must justify under oath, and for that purpose the officer may administer the oath. The amount of bail taken by a captain or sergeant of police under this section must be as follows: If the offense be the violation of a corporation ordinance, the amount of the bail must be one hundred dollars, except that if a conviction upon the charge would render the defendant liable only for a fine, the amount of the bail must be double the largest fine that could be imposed; if the conviction would render him liable to imprisonment for thirty days or less, the amount of bail must be two hundred dollars. In all other cases the amount of bail must be five hundred dollars. The form of the undertaking must be as follows:

We, A. B., defendant, and , residing at number , in , and C. D., defendant, residing at , hereby jointly and severally undertake that the above A. B., defendant, shall appear and answer the complaint [describing it briefly] before the magistrate before whom he would be arraigned if not bailed on the day of , eighteen hundred and , at o'clock, to answer to the complaint, and there remain to answer, subject to any order of the magistrate, and render himself in execution thereof, or if he fail to perform either of these conditions, then we will pay to the people of the state of New York the sum of

New.

(a) **When bail allowed.** — Indictment before arrest; when bail allowed. (*Babcock's case*, 2 Abb. [N. S.], 204.)

(b) **Preliminary examination important.** — Upon the question of bail before indictment the examination before the coroner or committing magistrate must be looked into to determine the character of the crime committed. (*People v. Beigler*, 3 Park., 816.)

(c) **A question of discretion with the court.** — Upon the application of a party under indictment, to be let to bail, the question is whether the court can see in the exercise of a sound judicial discretion that the appearance of the accused to take his trial will be secured by a recognizance. (*Ex parte Tayloe*, 5 Cow., 39; *People v. Dixon*, 8 Abb., 895; 4 Park., 651.)

(d) **Indictment raises presumption of guilt.** — In such cases the indictment raises a violent presumption of guilt, and the court will not go behind the indictment for evidence. (*People v. McLeod*, 25 Wend., 483, 568; 1 Hill, 377; *People v. Dixon*, 8 Abb., 895.)

(e) **Arrest on bench warrant.** — A defendant arrested on a bench warrant may be let to bail by any justice of the supreme court, if the court having cognizance of the indictment be not then in session. (*People v. O'Leary*, 14 Hun, 90; 20 Alb. L. J., 36.)

(f) **Must be taken to proper county.** — A person arrested on a bench warrant cannot be let to bail before being taken to the county where he has been indicted. (*Ex parte Gorsline*, 21 How., 85; 10 Abb., 282.)

§ 555. **Nature of bail before conviction.** — After the conviction of a crime not punishable with death, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only;
2. As a matter of discretion in all other cases.

New.

(a) **May be bailed after conviction.** — A convict brought up on his petition to have his sentence pronounced was admitted to bail for the reason that the record of conviction was not brought into court. (*McNeil's case*, Col. & C. Cas., 175.)

(b) **On habeas corpus.** — As to the provision permitting a prisoner to be bailed on *habeas corpus* when a writ of error had been allowed, see *People v. Lohman* (3 Barb., 450).

(c) **On appeal.** — One convicted of misdemeanor and sentenced to prison may be let to bail on an application made, even after the execution of judgment has commenced, if an appeal has been taken. (*People v. Folmsbee*, 60 Barb., 480.)

(d) **On certiorari.** — So also a prisoner having obtained a *certiorari* under former practice could be let out on bail. (*People v. McCully*, 1 Edm., 270; *People v. Vermilyea*, 7 Cow., 108.)

§ 556. **Nature of bail after conviction and upon appeal.** After conviction and upon an appeal, the defendant may be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of

it as the appellate court may direct, if the judgment be affirmed or modified or the appeal be dismissed ;

2. If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed.

New.

ARTICLE II.

BAIL, UPON BEING HELD TO ANSWER, BEFORE INDICTMENT.

SECTION 557, 558. By what courts or magistrates defendant may be admitted to bail.

559. At what time defendant may be admitted to bail by a magistrate.

560. In cities, if crime be felony, application for admission to bail must be on notice

561. Form of order, if made by the court.

562. Form of order, if made by a magistrate.

563. If application be denied by a magistrate, no subsequent application can be made to another magistrate.

564. Violation of last section a misdemeanor; admission to bail in such case, how revoked or vacated.

565. Construction of last two sections.

566. Decision final.

567. Bail, by whom taken.

568. How put in; and form of undertaking.

569. Qualifications of bail.

570-572. Bail, how to justify.

573. Bail may be examined as to sufficiency.

574. Other testimony may be received as to their sufficiency.

575. Decision as to their sufficiency; and filing affidavits of justification and undertaking.

576. On allowance of bail and execution of undertaking, defendant to be discharged; form of discharge.

577. If bail disallowed.

§ 557. (Amended 1882.) **By what courts or magistrates defendant may be admitted to bail.** — When the defendant has been held to answer, as provided in section two hundred and eight, the admission to bail may be by the magistrate by whom he is so held, if he be one of the magistrates mentioned in section one hundred and forty-seven, and the crime charged is a misdemeanor, or a felony punishable with imprisonment, not exceeding five years; or if he be a judge of the supreme court, or any judge

authorized to preside in a court having jurisdiction to try indictments, in all cases where bail may be taken before conviction, as provided in section five hundred and fifty-four.

3 R. S., 1001, § 31.

(a) **Any member of general sessions.** — After indictment found in the general sessions any one justice of the peace, as a member of that court, has power to admit to bail for any offense there triable. (*People v. Huggins*, 10 Wend., 464.)

(b) **Any officer discharging duty of county judge.** — The power of taking a recognizance of bail may be conferred upon any local officer appointed to discharge the duties of county judge. (*People v. Main*, 20 N. Y., 434.)

(c) **Must be bailed in county where warrant was issued.** — Where a defendant is arrested on a warrant, indorsed by a justice of another county, he cannot be let to bail in the county where he was arrested. (*Clark v. Cleveland*, 6 Hill, 344; *contra*, *Doyle v. Russell*, 30 Barb., 800.)

(d) **Same when arrested on bench warrant.** — A person arrested on a bench warrant cannot be let to bail before being taken to the county where he was indicted. (*Ex parte Gorsline*, 21 How., 85; 10 Abb., 282; *People v. Chapman*, 30 How., 203.)

(e) **Bail a matter incident to the hearing.** — The power to admit to bail is incident to the power to hear and determine the offense. (*People v. Van Horne*, 8 Barb., 158.)

(e) **Cannot bail during court.** — After indictment found, a justice of the supreme court has no power to let to bail during the session of the court having jurisdiction to try the indictment. (*Ex parte Babcock*, 2 Abb. [N. S.], 204.)

(f) **On bench warrant.** — A defendant arrested on a bench warrant, may be let to bail by any justice of the supreme court, if the court having cognizance of the indictment be not then in session. (*People v. Clews*, 14 Hun, 90; 20 Alb. L. J., 36; 77 N. Y., 39.)

(g) **By police magistrate.** — Under act of 1876, a police magistrate has power to admit a prisoner to bail pending an examination before him. (*Ex parte Gessner*, 58 How., 515.)

§ 558. By what courts or magistrates defendant may be admitted to bail. — When, by reason of the degree of the crime, the committing magistrate has not authority to admit to bail, the defendant may be admitted to bail by one of the officers having authority to admit to bail in the case, as provided in the second subdivision of the last section, or by the court to which the depositions and statements are returned by the committing magistrate, as provided in section two hundred and twenty one, if the case be triable therein, or if not, by the court to which, after indictment, it may be sent or removed for trial.

3 R. S., 1023, § 59.

§ 559. **At what time defendant may be admitted to bail by a magistrate.** — The defendant may be admitted to bail by a magistrate, as provided in the last two sections, upon being held to answer, or at any time before the return of the depositions and statement to the court. After that time he can be admitted to bail only by a judge presiding in the court in which the crime is triable, if it be sitting, or if not, by one of the magistrates mentioned in the second, subdivision of section five hundred and fifty-seven.

Id.

(a) **Court must bail alone.** — The court alone has power to bail a prisoner during its session. (*Ex parte Babcock*, 2 Abb. [N. S.], 204.)

(b) **When not in session.** — But if the court having cognizance of the indictment be not then in session, a justice of the supreme court may admit to bail a prisoner arrested on a bench warrant. (*People v. Clews*, 77 N. Y., 39.)

§ 560. **In cities, if crime be felony, application for admission to bail must be on notice.** — In the several cities of this state, if the crime charged be a felony, the application for admission to bail must be upon notice of at least two days, to the district attorney of the county, unless the magistrate, by order, fixes a shorter time; and the committing magistrate, upon the like notice in writing, requiring him to do so, must transmit the depositions and statement, or a copy thereof, to the court or magistrate to whom the application for bail is to be made.

New.

§ 561. **Form of order, if made by the court.** — If the application be to the court, an order must be made granting or denying it, and if it be granted, stating the sum in which bail may be taken.

New

§ 562. **Form of order, if made by a magistrate.** — If the application be to a magistrate, he must certify, in writing, his decision granting or denying the same; and if he grant the application, must state in the certificate the sum in which bail may be taken; which certificate he must cause to be forthwith filed with the clerk of the court to which the depositions and statement are required to be sent.

New.

§ 563. If application be denied by a magistrate, no subsequent application can be made to another magistrate. If an application for admission to bail, made to a magistrate, be denied, not more than two subsequent applications therefor can be made to other magistrates, except that an application can be made to any magistrate mentioned in subdivision two of section five hundred and fifty-seven, if no application has been previously made to a magistrate mentioned therein.

New.

(a) When *res adjudicata*. — Where the committing magistrate and the court of sessions in which the indictment is pending, have refused to admit the prisoner to bail, he cannot be bailed by a judge of the supreme court at chambers; as to such judge it is "*res adjudicata*." (*People v. Cunningham*, 3 Park, 531; *Id.*, 520.)

§ 564. Violation of last section a misdemeanor; admission to bail in such case, how revoked or vacated. — A violation of the last section is punishable as a misdemeanor, and the admission of the defendant to bail contrary thereto may be revoked by the magistrate who made it, or vacated by the court to which the depositions and statement are or must be sent, as provided in section two hundred and twenty-one or to which, after indictment, the action must be sent for trial.

New.

§ 565. Construction of last two sections. — The provisions of the last two sections shall not be construed to limit the power of any judge presiding in the court in which the offense is triable to let the defendant to bail.

New.

§ 566. Decision final. — The decision of the judge presiding in the court in which the crime is triable, granting or denying bail, is final, except as provided in section five hundred and sixty-three.

New.

§ 567. Bail, by whom taken. — If the defendant be admitted to bail by a magistrate, the bail must be taken by the magistrate granting the order, unless the order shall specify that the same may be taken by some other designated magistrate.

New.

§ 568. (Amended 1882.) **How put in; and form of undertaking.**—Bail is put in by written undertaking executed by sufficient surety [with or without the defendant, in the discretion of the magistrate], and acknowledged before the magistrate in substantially the following form :

“An order having been made on the day of , eighteen hundred and , by A. B., a justice of the peace of the town of [or as the case may be], that C. D. be held to answer upon a charge of [stating briefly the nature of the crime], upon which he has been duly admitted to bail in the sum of . dollars.

“We, [C. D., defendant, if the defendant join in the undertaking], of [stating his place of residence and his occupation] and E. F., [and G. H. stating place of residence and occupation] surety or sureties [as the case may be], hereby undertake, jointly and severally, that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars” [inserting the sum in which the defendant is admitted to bail].

New.

§ 569. **Qualifications of bail.**—The qualifications of bail are as follows :

1. He must be a resident, and a householder or freeholder within the state, and, unless the magistrate otherwise direct, within the county ;

2. He must be worth the amount specified in the undertaking, exclusive of property exempt from execution ; but the magistrate, on taking bail, may require two sureties, or may allow two or more to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of one sufficient surety.

New.

(a) **Attorney cannot be surety.**—In no case shall an attorney or counselor be bail in any civil or criminal case or proceeding. (Sup. Ct. Rule 5; *Miles v. Clark*, 4 Bos., 632; 2 id., 709; *Craig v. Scott*, 1 Wend., 35; *King v.*

Sheriff of Surry, 2 East., 181; *Wheeler v. Wilcox*, 7 Abb., 78; *Coster v. Watson*, 18 Johns., 535.) See as to his liability, etc., *Wilmot v. Meeserole* (48 How., 430; 16 Abb. [N. S.], 309).

§ 570. **Bail, how to justify.** — Except as prescribed in the next section, the bail may, in the exercise of a just discretion, be taken, and may justify, without notice to the district attorney, or reasonable notice of the intention to give bail may be required by the court or magistrate, to be given to the district attorney. When given, the notice shall be as prescribed in the next section.

New.

§ 571. **Bail, how to justify.** — In the several cities of this state, if the crime charged be a felony, a previous notice in writing of at least two days, of the time and place of giving the bail, must be served upon the district attorney of the county, stating:

1. The names, places of residence and occupations of the proposed surety or sureties;

2. A general description of the real or personal property of the surety or sureties, in respect to which they propose to justify as to their sufficiency, with the incumbrances thereon, by mortgage, judgment or otherwise, if any.

The district attorney may waive the giving of the notice herein provided for, or a shorter time than two days may be directed by the court or magistrate requiring the notice.

New.

§ 572. **Bail, how to justify.** — The surety or sureties must in all cases justify by affidavit, taken before the magistrate. The affidavit must state that each of the sureties possesses the qualifications provided in section five hundred and sixty-nine.

New.

Perjury may be predicated on a false affidavit made in justification of bail. (*Stratton v. People*, 20 Hun, 288; 81 N. Y., 629.)

§ 573. **Bail may be examined as to sufficiency.** — The district attorney, or the magistrate, may thereupon further examine the sureties upon oath, concerning their sufficiency, in such manner as the magistrate may deem proper. The questions put to the sureties, and their answers, must be reduced to writing, and must be subscribed by them.

New.

§ 574. **Decision as to their sufficiency, and filing affidavits of justification and undertaking.** — The magistrate may also receive other testimony, either for or against the sufficiency of the bail, and may, from time to time, adjourn the taking of bail, to afford an opportunity of proving or disproving its sufficiency.

New.

§ 575. When the examination is closed, the magistrate must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification and the undertaking of bail, to be filed with the clerk of the court to which the depositions and statement must be sent, as prescribed in section two hundred and twenty-one.

New.

§ 576. **On allowance of bail and execution of undertaking, defendant to be discharged; form of discharge.** — Upon the allowance of the bail and the execution of the undertaking, the court or magistrate must make an order, signed by him, with his name of office, for the discharge of the defendant, to the following effect:

“ To the sheriff of the county of _____, [or, in the city and county of New York, ‘to the keeper of the city prison of the city of New York:’] A. B., who is detained by you on a commitment to answer a charge for the crime of [designating it generally], having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody.”

New.

§ 577. (Amended 1882.) **If bail disallowed.** — If the bail be disallowed, the defendant must be detained in custody until lawfully discharged.

New.

ARTICLE III.

BAIL, UPON AN INDIOTMENT BEFORE CONVICTION.

SECTION 578. In misdemeanor, officer to take defendant before a magistrate.

579. In felony, to deliver him into custody.

580. Taking bail, when offense is bailable.

581. Bail, how put in; form of undertaking.

582. Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.

§ 578. In misdemeanor, officer to take defendant before magistrate. — When the crime charged in the indictment is a misdemeanor, the officer serving the bench warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail as prescribed in sections three hundred and two and three hundred and five.

New.

(a) **Must be taken to proper county.** — A person arrested on a bench warrant cannot be let to bail before being taken to the county where he was indicted. (*Ex parte Gorsline*, 21 How., 85; 10 Abb., 282; *People v. Chapman*, 30 How., 202; see, also, *People v. Folmsbee*, 80 Barb., 480.)

§ 579. In felony, to deliver him into custody. — If the crime charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody, according to the command of the bench warrant, as prescribed in section three hundred and one.

New. (See *People v. Claus*, 14 Hun, 90; 77 N. Y., 89.)

§ 580. Taking bail, when offense is bailable. — When the defendant is so delivered into custody, if the felony charged be bailable, and the amount of bail have been fixed, bail may be taken by the judge presiding in the court in which the indictment was found, or to which it is sent or removed, or by any magistrate in the county belonging to the class mentioned in the second subdivision of section five hundred and fifty-seven.

New.

§ 581. (Amended 1882.) Bail, how put in; form of undertaking. — The bail must be put in by a written undertaking, executed by a sufficient surety, with or without the defendants, in the discretion of the magistrate, and acknowledged before the court

or its clerk in open court or the magistrate in substantially the following form :

"An indictment having been found on the day of , eighteen hundred and , in the *court of sessions of the county of Albany* [or as the case may be] charging A. B. with the crime of [designating it generally], and he having been duly admitted to bail in the sum of dollars.

"We, A. B., defendant [if the defendant join in the undertaking], and C. D., surety or sureties, as the case may be, of [stating his place of residence and occupation], and E. F., of [stating his place of residence and occupation], hereby jointly and severally undertake that the above-named A. B. shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court ; and if convicted, shall appear for judgment, and render himself in execution thereof ; or if he fails to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars" [inserting the sum in which the defendant is admitted to bail.]

New in form.

§ 582. Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.—The provisions contained in sections five hundred and sixty-nine to five hundred and seventy-seven, both inclusive, apply to the qualifications of the sureties, and to all the proceedings respecting the putting in and justification of bail, and incidental thereto.

New.

ARTICLE IV.

BAIL UPON AN APPEAL.

SECTION 583. Who may admit to bail.

584. Notice of the application, when required.

585. Qualifications of bail, and how put in.

§ 583. **Who may admit to bail.**—In the cases in which the defendant may be admitted to bail upon an appeal, as provided in section five hundred and fifty-six, the order admitting him to bail may be made, either by the court from which the appeal is

taken, or the presiding judge thereof, or by the appellate court, or a judge thereof, or by a judge of the supreme court.

New.

§ 584. **Notice of the application, when required.** — The court or officer to whom the application for bail is made may require such notice thereof as he deems reasonable, to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

New.

§ 585. **Qualifications of bail, and how put in.** — The sureties must possess the qualifications, and the bail must be put in all respects, in the manner prescribed by sections five hundred and sixty-nine to five hundred and seventy-seven, both inclusive; except that the undertaking must be to the effect that the defendant will, in all respects, abide the orders and judgment of the appellate court upon the appeal.

New.

ARTICLE V.

DEPOSIT INSTEAD OF BAIL.

SECTION 586. *Deposit, when and how made.*

587. May be made after bail given, and before forfeiture; and in such case bail discharged.

588. Bail may be given after deposit; and in such case money deposited to be refunded.

589. Deposit to be applied to payment of judgment of fine, and surplus to be refunded.

§ 586. **Deposit, when and how made.** — The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the county treasurer of the county in which he is held to answer, the sum mentioned in the order; and upon delivering to the officer, in whose custody he is, a certificate of the deposit, he must be discharged from custody.

New.

§ 587. **May be made after bail given, and before forfeiture; and in such case bail discharged.** — If the defendant have given bail, he may, at any time before the forfeiture of

the undertaking, in like manner deposit the sum mentioned in the undertaking; and upon the deposit being made the bail is exonerated.

3 R. S., 773, §§ 88, 40.

§ 588. **Bail may be given after deposit; and in such case money deposited to be refunded.** — If money be deposited, as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail, at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken must thereupon direct, in the order of allowance, that the money deposited be refunded by the county treasurer to the defendant; and it must be refunded accordingly.

Id.

§ 589. **Deposit to be applied to payment of judgment of fine, and surplus to be refunded.** — When money has been deposited, if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant.

New.

ARTICLE VI.

SURRENDER OF THE DEFENDANT.

SECTION 590. Surrender, by whom, when and how made.

591. By whom, when and where defendant may be arrested for the purpose of a surrender.

592. On surrender before forfeiture, money deposited to be refunded; order therefor, how obtained.

§ 590. **Surrender, by whom, when and how made.** — At any time before the forfeiture of the undertaking, any surety may surrender the defendant in his exoneration, or the defendant may surrender himself, to the officer to whose custody he was committed, at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the court in which the indictment or the appeal, as the case may be, is pending, may, upon a notice of five days to the district attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated; and on filing the order and the papers used on the application, the bail is exonerated accordingly.

New.

§ 591. **By whom, when and where, defendant may be arrested for the purpose of a surrender.** — For the purpose of surrendering the defendant, any surety, at any time before he is finally charged, and at any place within the state, may himself arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

New.

§ 592. **On surrender before forfeiture, money deposited to be refunded.** — If money have been deposited instead of bail, and the defendant at any time before the forfeiture thereof surrender himself to the officer to whom the commitment was directed, in the manner provided in section five hundred and ninety, the court must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate.

New.

ARTICLE VII.

FORFEITURE OF THE UNDERTAKING OF BAIL, OR OF THE DEPOSIT OF MONEY.

SECTION 593. In what cases, and how ordered.

594. When and how forfeiture may be discharged.

595. Forfeiture of bail, to be enforced by action.

596. Deposit of money, when forfeited; how disposed of.

597. Remission of forfeiture.

598. Application therefor, how made and on what terms granted.

§ 593. **In what cases, and how ordered.** — If, without sufficient excuse, the defendant neglect to appear for arraignment,

or for trial or judgment, or upon any other occasion where his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes; and the undertaking of his bail, or the money deposited, instead of bail, as the case may be, is thereupon forfeited.

New.

(a) **Must declare bail forfeited promptly.**—The court have no power to respite a recognizance to a succeeding term, against the express dissent of the bail. (*People v. Clary*, 17 Wend., 874; *People v. Green*, 5 Hill, 647.)

(b) **Discharge of bail, when.**—If a party, bound by a recognizance, be subsequently arrested on a bench warrant, before a forfeiture, and escape, his bail are discharged. (*People v. Stager*, 10 Wend., 431; *People v. Derby*, 1 Park., 892; *People v. Mack*, Id., 567.)

(c) **Bail not released.**—An arrest on a bench warrant after a forfeiture does not release the bail. (*People v. Annable*, 7 Hill, 83.)

(d) **Forfeited, when.**—A recognizance is forfeited, though the defendant appear, if he depart before the conclusion of the trial. (*People v. McCoy*, 39 Barb., 73; *People v. Jane*, 27 Barb., 58.)

(e) **Indictment need not be found.**—It is no defense to an action on a recognizance for appearance that no indictment was found against the principal at such court. (*Champlain v. People*, 2 N. Y., 82.)

(f) **May be called upon at any time of court.**—A party under recognizance to appear may be called upon on any day during the continuance of the court without notice. (*People v. Blankman*, 17 Wend., 252.)

(g) **Must be always at hand.**—If the defendant be called at any stage of the trial, and fail to appear and answer, his recognizance may be declared forfeited. (*People v. Petry*, 2 Hilt., 528.)

(h) **Must answer.**—There is a breach of the recognizance if the defendant, though corporally present, do not answer when called. (*People v. Wilgus*, 5 Den., 58.)

(i) **Excused when arrested on another charge.**—It is a good defense to an action on a recognizance for a person's appearance to answer a criminal charge that he has been arrested and committed to jail in another county. (*People v. Bartlett*, 3 Hill, 570; *People v. Haines*, 1 Den., 454.)

(j) **Or has enlisted as a soldier.**—It is a valid excuse for the non-appearance of the principal that he had enlisted as a soldier in the United States, etc. (*People v. Chusney*, 44 Barb., 118; *People v. Cook*, 30 How., 110.)

(k) **Must be present at adjournment.**—When a recognizance is conditioned for the appearance of the defendant on a day certain, and from time to time as directed by the justice, and the proceedings are adjourned at a time when the defendant is not present, there cannot be a forfeiture of the recognizance at a subsequent adjourned day. (*People v. Scott*, 67 N. Y., 585.)

§ 594. **When and how forfeiture may be discharged.**—If, at any time before the final adjournment of the court, the

defendant appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or deposit to be discharged, upon such terms as are just.

New.

(a) **Effect of forfeiture.**—Where there had been a forfeiture of the recognizance the court will not discharge the bail on the entry of the new recognizance, but will stay proceedings upon the forfeiture. (*People v. Corman*, 5 Daly, 527; 49 How., 91.)

§ 595. Forfeiture of bail, to be enforced by action.—

If the forfeiture be not discharged, as provided in the last section, the district attorney may, at any time after the adjournment of the court, proceed against any surety upon his undertaking. Such proceeding shall be by action only, except in the city and county of New York, where it shall be in the method now prescribed by special statute.

New.

§ 596. Deposit of money when forfeited, how disposed of.—If, by reason of the neglect of the defendant to appear, as provided in section five hundred and ninety-three, money deposited instead of bail is forfeited, and the forfeiture be not discharged or remitted, as provided in sections five hundred and ninety-four and five hundred and ninety-seven, the county treasurer with whom it is deposited may, at any time after the final adjournment of the court, apply the money deposited to the use of the county.

New.

§ 597. Remission of forfeiture.—After the forfeiture of the undertaking or deposit, as provided in this article, the court directing the forfeiture, the county court of the county, or in the city of New York, the court of common pleas of that city, may remit the forfeiture or any part thereof, upon such terms as are just.

New.

§ 598. (Amended 1882.) Application therefor, how made and on what terms granted.—The application must be upon at least five days' notice to the district attorney of the county served with copies of the affidavits and papers on which it is founded, and can be granted only upon payment of the costs and expenses incurred in the proceedings for the enforcement of the forfeiture.

New.

ARTICLE VIII.

RE-COMMITMENT OF THE DEFENDANT, AFTER HAVING GIVEN BAIL,
OR DEPOSITED MONEY INSTEAD OF BAIL.

SECTION 599. In what cases.

600. Contents of the order.

601. Defendant may be arrested in any county.

602. If for failure to appear for judgment, defendant must be committed.

603. If for other cause, he may be admitted to bail.

604. Bail in such case, by whom taken.

605. Form of the undertaking.

606. Qualifications of bail, and how put in.

§ 599. (Amended 1882.) **In what cases.**—The court to which the committing magistrate returns the deposition and statement, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, or if the court be not in session, any judge thereof may direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time he was admitted to bail, and his detention until legally discharged, in the following cases :

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof, as provided in section five hundred and ninety-three ;

2. When it satisfactorily appears to the court that his bail, or either of them, are dead, or insufficient, or have removed from the state ;

3. Upon an indictment being found, in the cases provided in section three hundred and six.

New.

§ 600. **Contents of the order.**—The order for the recommitment of the defendant must recite, generally, the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal or policeman in this state, and committed to the officer to whose custody he was committed, at the time he was admitted to bail, to be detained until legally discharged.

Laws 1879, ch. 59.

§ 601. **Defendant may be arrested in any county.**—The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest; except, that when arrested in another county, the order need not be indorsed by a magistrate of that county.

New.

§ 602. **If for failure to appear for judgment, defendant must be committed.**—If the order recite, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

New.

§ 603. **If for other cause, he may be admitted to bail.**—If the order be made for any other cause, and the crime be bailable, the court may fix the amount of bail, and may direct in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

New.

§ 604. **Bail in such case, by whom taken.**—When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority, in a similar case, to admit to bail upon the holding of the defendant to answer before indictment, as prescribed in sections five hundred and fifty-seven and five hundred and fifty-eight, or by any other magistrate to be designated by the court.

New.

§ 605. (Amended 1882.) **Form of the undertaking.**—When bail is taken upon the recommitment of the defendant, the undertaking of bail must be in substantially the following form:

“An order having been made on the day of eighteen hundred and , by the court of [naming the court], that A. B. be admitted to bail in the sum of dollars, in an action pending in that court against him in behalf of the people of the state of New York, upon an [information, presentment, indictment or appeal, as the case may be].

“We, A. B., defendant, [if the defendant join in the undertaking], and C. D., surety of [stating his place of residence and

occupation], and E. F., surety of [stating his place of residence and occupation], hereby, jointly and severally, undertake that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required, upon that [information, presentment, indictment or appeal, as the case may be], and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars " [inserting the sum in which the defendant is admitted to bail].

New in form.

§ 606. **Qualifications of bail, and how put in.** — The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed by sections five hundred and sixty-nine to five hundred and seventy-seven, inclusive.

New.

CHAPTER II.

COMPELLING THE ATTENDANCE OF WITNESSES.

SECTION 607. Subpoena defined.

608. Magistrate may issue subpoenas, on information or presentment.

609. District attorney may issue subpoenas for witnesses before grand jury.

610. He may also issue subpoenas for the people, on trial of an indictment.

611. Clerk may issue blank subpoenas for witnesses for defendant on trial.

612. Form of subpoena.

613. Requirement in subpoena, to produce books, papers and documents.

614. Subpoena, by whom served.

615. How served.

616. Payment of expenses of witness, when he is from without the county, or is poor.

617. Payment of expenses of witness, when he is from without the county, or is poor.

618. Witnesses residing or served with subpoena out of the county, when and how compelled to attend.

619. Disobedience to subpoena, or refusal to be sworn or to testify, how punished.

§ 607. **Subpoena defined.**—The process by which the attendance of a witness before a court or magistrate is required is a subpoena.

New.

§ 608. **Magistrate may issue subpoenas for witnesses before grand jury.**—A magistrate, before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state, either on behalf of the people or of the defendant.

New.

§ 609. **District attorney may issue subpoenas for witnesses before grand jury.**—The district attorney of the county may issue subpoenas, subscribed by him for witnesses within the state, in support of the prosecution or for such other witnesses as the grand jury may direct, to appear before the grand jury, upon an investigation pending before them.

3 R. S., 1019, § 82.

§ 610. **He may also issue subpoenas for the people, on trial of an indictment.**—The district attorney may, in like manner, issue subpoenas subscribed by him, for witnesses within the state in support of an indictment, to appear before the court at which it is to be tried.

3 R. S., 1023, § 86; 2 R. L., 147, § 10.

§ 611. **Clerk may issue blank subpoenas for witnesses for defendant, on trial.**—The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

3 R. S., 1033, § 62; 1 R. L., 497, § 12.

§ 612. **Form of subpoena.**—A subpoena, authorized by the last four sections, must be substantially in the following form:

“In the name of the people of the state of New York:
To A. B.

“You are commanded to appear before *C. D.*, a justice of the peace of the town of _____, [or “the grand jury of the county of _____,” or “the court of sessions of the county of _____,” or

as the case may be,] at [naming the place,] on [stating the day and hour,] as a witness in a criminal action prosecuted by the people of the state of New York, against E. F.

"Dated at the town of , [as the case may be,] the day of , 18 .

"G. H., justice of the peace," [or "I. K., district attorney," or "By order of the court, L. M., clerk," as the case may be].

New in form.

§ 613. **Requirement in subpoena, to produce books, papers and documents** — If books, papers or documents be required, a direction to the following effect must be contained in the subpoena: "And you are required also to bring with you the following," [describing intelligibly the books, papers or documents required.]

New.

§ 614. **Subpoena, by whom served.** — A peace officer must serve, in his county, city, town or village, as the case may be, any subpoena delivered to him for service, either on the part of the people or of the defendant; and must make a written return of the service, subscribed by him, stating the time and place of service, without delay. The subpoena may, however, be served by any other person.

New.

§ 615. **How served.** — A subpoena is served by delivering it, or by showing it, and delivering a copy thereof, to the witness personally.

New.

§ 616. **Payment of expenses of witness, when he is from without the county, or is poor.** — When a person attends before a magistrate, grand jury or court, as a witness on behalf of the people, upon a subpoena, or pursuant to an undertaking, and it appears that he has come from a place out of the county, or that he is poor, the court, if the attendance of the witness be upon a trial, by an order entered upon its minutes, or in any other case, the county judge, or in the city of New York the recorder or city judge, or judge of the general sessions of that city, by a written order, may direct the county treasurer

to pay the witness a reasonable sum, to be specified in the order, for his expenses.

§ R. S., 1064, §§ 80, 81, 82, 83.

§ 617. Payment of expenses of witness, when he is from without the county, or is poor. — Upon the production of the order, or a certified copy thereof, the county treasurer must pay the witness the sum specified therein, out of the county treasury.

Id.

§ 618. Witnesses residing or served with subpoena, out of the county, when and how compelled to attend. — No person is obliged to attend as a witness, before a court or magistrate out of the county where the witness resides or is served with the subpoena, unless the judge of the court in which the crime is triable, or a judge of the supreme court, or a county judge, or in the city of New York the recorder or city judge, or judge of the general sessions of that city, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.

New.

§ 619. Disobedience to subpoena, or refusal to be sworn or to testify, how punished. — Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate as for a criminal contempt, in the manner provided in the Code of Civil Procedure.

Code of Civ. Proc., §§ 8-18, 858-963.

(a) **Must attend within a reasonable time.** — A witness must be allowed a reasonable time to attend on a subpoena, and need not travel on Sunday. (*Wilkie v. Chadwick*, 13 Wend., 49.)

Extreme poverty, however, will excuse non-attendance. (*People v. Davis*, 15 Wend., 602.)

(b) **Need not obey radically defective subpoena.** — When subpoena is radically defective witness cannot be punished. (*People v. Dutcher*, 3 Abb. [N. S.], 151.)

(c) **Unimportant defect.** — What is an unimportant defect. (*People v. Van Wyck*, 2 Caines, 233.)

(d) **Before grand jury.**—A refusal of witness to answer before a grand jury may be punished as a contempt in court. (*People v. Kelly*, 24 N. Y., 74; *People v. Fancher*, 2 Hun, 226.)

(e) **Attachment.**—Proof of an attachment against a witness failing to answer need not be in writing. (*Baker v. Williams*, 12 Barb., 527.)

(f) **Unimportant evidence.**—The witness' belief that the evidence is of no benefit is no excuse. (*Bonesteel v. Lynd*, 8 How., 226; *Id.*, 352; *People v. Davis*, 15 Wend., 602.)

(g) **Sickness in family as an excuse.**—Sickness in the family, unless shown to be serious, no excuse. (*People v. Davis*, 15 Wend., 602.)

(h) **Non-payment of fees.**—Non-payment of fees from day to day is a good excuse in civil case. (*Hurd v. Swan*, 4 Den., 75; *Courtney v. Baker*, 8 id., 27.)

(i) **Material evidence.**—In an action for a penalty it must be shown that the witness could have given material evidence, and that damage resulted. (*Id.*)

CHAPTER III.

EXAMINATION OF WITNESSES, CONDITIONALLY.

SECTION 620. Witnesses to be examined conditionally for the defendant, as provided in this chapter.

621. In what cases defendant may apply for order.

622. Application, on what facts to be founded.

623. If during term, to be made to the court.

624. If not during term, to whom to be made.

625. The order, when granted and what to contain.

626. If made by the court, may direct examination before a judge or magistrate; if made by a judge, examination to be before him.

627. On proof of service, if district attorney absent, examination to proceed.

628. If facts on which order was founded, be disproved, examination not to proceed.

629. Testimony, how taken and authenticated.

630. Deposition, how, by whom and when filed.

631. When it may be read in evidence.

632. When to be excluded.

633. On reading the deposition, on trial, what objections may be taken.

634. Attendance of witness for examination, how compelled.

635. Disobedience of witness, how punished.

§ 620. Witnesses to be examined conditionally for the defendant, as provided in this chapter.—When a defendant

has been held to answer a charge of a crime, he may, either before or after indictment, have witnesses examined conditionally on his behalf, as prescribed in this chapter, and not otherwise.

3 R. S., 1025, § 79; Id., 652, § 1.

§ 621. In what cases defendant may apply for order. — When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

3 R. S., 653, § 2.

(a) **Probable absence.** — Where it is certain or probable that the personal attendance of the witness cannot be had at the trial, his deposition should be taken. (*Green v. Kent*, 7 Cow., 59; *Wait v. Whitney*, Id., 69; *Ten Eyck v. Perkins*, 2 Wend., 308.)

(b) **Foreign witness.** — When a foreign witness is temporarily present he may be examined. (*Wait v. Whitney*, 7 Cow., 69.)

(c) **When taken.** — Such examination may be taken at any stage of the case. (*Packard v. Hill*, 7 Cow., 489; *Fort v. Ragusen*, 2 Johns. Ch., 246; *Rockwell v. Folsom*, 4 id., 165.)

(d) **Pregnant female.** — Held, also, that the evidence of a woman in an advanced state of pregnancy may be so taken. (*Clark v. Dibble*, 16 Wend., 601.)

(e) **Infirm witness.** — Infirm witness may be so examined at any time after suit is brought. (*Concklin v. Hart*, Col. & Caines, 74; 1 Johns. Cas., 108.)

(f) **Continued absence necessary.** — To entitle a deposition to be read the continued absence of the witness must be shown. (*Fry v. Bennett*, 4 Duer, 247.)

(g) **Invalid.** — Evidence of such a witness may be taken during the trial. (*Cole v. Cole*, 12 Hun., 878.)

(h) **Evidence of continued absence.** — What evidence necessary to show continued absence of witness from state. (*Bronner v. Frauenthal*, 37 N. Y., 166; 9 Bos., 350.)

(i) **Where witness has returned.** — A deposition may be read, though the witness returned after the examination, if he departed again before the trial. (*Markoe v. Aldrich*, 1 Abb., 55.)

§ 622. Application, on what fact to be founded. — The application must be made upon affidavit showing:

1. The nature of the crime charged;
2. The state of the proceedings in the action;
3. The name and residence of the witness, and that his testimony is material to the defense of the action; and,
4. That the witness is about to leave the state, or is so sick or

infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial.

8 R. S., 1025, § 79; *Id.*, 653, § 2.

(a) **What affidavit should state.**—The affidavit need not state the probable inability of the witness to attend the trial. (*Ten Eyck v. Perkins*, 2 Wend., 308.)

(b) **Must be made in good faith.**—The application must show that it is made in good faith. (*Paton v. Westervelt*, 5 How., 399.)

(c) **Certainty of non-attendance.**—Where it is probable or certain that a witness cannot attend the trial an application will be granted. (*Green v. Kent*, 7 Cow., 59; *Wait v. Whitney*, *Id.*, 69; *Mumford v. Church*, 1 Johns. Cas., 147; *Concklin v. Hart*, Col. & Caines, 74.)

(d) **Matter of right.**—It is a matter of right in a proper case when application is made in good faith. (*Martin v. Hicks*, 6 Hun, 238; 1 Abb. N. C., 341; *Green v. Herder*, 7 Rob., 456.)

(e) **Drift of the evidence.**—An affidavit for such an order must show the subject on which the witness is to be examined, and the facts claimed to be within his knowledge. (*Dauchy v. Miller*, 16 Abb. [N. S.], 100.)

(f) **Must show materiality of evidence.**—Must show facts and circumstances showing materiality of evidence desired. (*Byrns v. Mulligan*, 9 J. & Sp., 515.)

(g) **Defective affidavit.**—A defect of the affidavit cannot be cured by examining the witness. (*Henderson v. Fullerton*, 54 How., 422.)

§ 623. **If during term, to be made to the court.**—The application, if made during the term, must be made to the court.
Id.

§ 624. **If not during term, to whom to be made.**—If not made during the term, it may be made as follows :

1. When the indictment is pending in a court of oyer and terminer, or in a court of sessions other than in the city of New York, to a judge of the supreme court, or to the county judge;

2. When the indictment is pending in the court of general sessions of the city of New York, to the recorder or city judge or judge of general sessions, or one of the judges of the court of common pleas of that city;

3. When the indictment is pending in a city court, to the recorder or city judge of the city in which it is pending.

Id.

§ 625. **The order, when granted and what to contain.**
If the court or officer be satisfied, that the examination of the witness is necessary to the attainment of justice, an order must

be made, that the witness be examined conditionally, at a specified time and place, and that a copy of the order, and of the affidavit on which it was granted, be served on the district attorney, within a specified time before that fixed for the examination.

Id., § 3.

§ 626. **If made by the court, may direct examination before a judge or magistrate.**— If the order be made by the court, it may direct that the examination be taken before a judge thereof, or before a magistrate in the county, to be named in the order. If made by any of the officers mentioned in section six hundred and twenty-four, it must direct the examination to be taken before him.

Id., § 3.

§ 627. **On proof of service, if district attorney absent, examination to proceed.**— On proof being furnished to the officer before whom the examination is appointed, of the service upon the district attorney, of a copy of the order, and of the affidavit on which it was granted, if no counsel appear on the part of the people, the examination must proceed.

3 R. S., 653, § 5.

Service of notice may be proved by affidavit. (*Ten Eyck v. Perkins*, 2 Wend., 308.)

§ 628. **If facts on which order was founded be disproved, examination not to proceed.**— If the district attorney or other counsel appear on the part of the people, and it be shown to the satisfaction of the court or officer, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

Id., § 4.

§ 629. **Testimony, how taken and authenticated.**— The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information, as prescribed in section two hundred.

Id., § 6. (See § 200, *ante*, and cases there cited.)

(a) **Must show that deposition was read to witness.**— It is sufficient that the court certify that the deposition was read to the witness. (*Sheldon v. Wood*, 2 Bos., 267; 24 N. Y., 607.)

(b) **Judge need not write examination personally.** — The judge need not write down the examination himself. (*McDonald v. Garrison*, 18 How., 249; 9 Abb., 34.)

(c) **Certificate.** — The certificate must state that the deposition was read to the witness and subscribed by him. (*Foster v. Bullock*, 12 Hun, 200.)

(d) **Defective depositions.** (*People v. Restell*, 3 Hill, 289; *People v. Ward*, 4 Park., 516; *People v. Chrystal*, 8 Barb., 545.)

§ 630. **Deposition, how, by whom and when filed.** — The deposition must be retained by the officer taking it, and filed by him in the office of the clerk of the court without unnecessary delay.

Id., § 6.

(a) **May be filed nunc pro tunc.** — A deposition may be ordered filed *nunc pro tunc*. (*Burdell v. Burdell*, 1 Duer, 625; 11 N. Y. Leg. Obs., 183; *Bank of Silver Creek v. Browning*, 16 Abb., 272.)

§ 631. **When it may be read in evidence.** — The deposition, or a certified copy thereof, may be read in evidence by either party on trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state.

3 R. S., 654, § 7.

(a) **What must be shown** — The inability of witness must exist at the time of trial. (*Fry v. Bennett*, 4 Duer, 247; see *Donnell v. Walsh*, 6 Bos., 621.)

It makes no difference that he returned to the state for a brief time after the examination was had. (*Markoe v. Aldrich*, 1 Abb., 55.)

(b) **Proof of continued absence.** — What is sufficient proof of continued absence. (*Bronner v. Frauenthal*, 37 N. Y., 166; *Markoe v. Aldrich*, 1 Abb., 55.)

(c) **Defective certificate.** — A defect in the form of the officer's certificate must be taken advantage of by a motion to suppress, if there be ample time before the trial. (*Sheldon v. Wood*, 2 Bos., 287; 24 N. Y., 607.)

§ 632. **When to be excluded.** — The deposition cannot, however, be read if it appear that the copy of the order and of the affidavit on which it was founded was not served on the district attorney, as directed, or that the examination was in any respect unfair or not conducted as prescribed in this chapter.

Id., § 8.

(a) **Right of cross-examination.** — There must be an opportunity to cross-examine. (*Hewlett v. Wood*, 67 N. Y., 394; 7 Hun, 297.)

(b) **Consent cannot be withdrawn.** — If consent be given to read deposition it cannot be withdrawn. (*Beebe v. People*, 5 Hill, 32.)

(c) **Objection to notice, when not valid.** — If the opposite party attend and cross-examine, he cannot object to the sufficiency of the notice on the trial. (*Elverson v. Vanderpool*, 9 J. & Sp., 257.)

(d) **When deposition suppressed.** — If the opportunity to cross-examine be lost through the fault or omission of the party in whose behalf the witness is examined, the deposition must be suppressed. (*Hewlett v. Wood*, 67 N. Y., 394; 7 Hun, 227.)

(e) **Refusal of witness to answer.** — That the witness refused to answer a material question is no ground for rejecting the deposition at the trial in the absence of a previous motion to suppress. (*Starin v. Atlantic Mutual Insurance Co.*, 68 N. Y., 77; 6 J. & Sp., 281.)

§ 633. **On reading the deposition, on trial, what objections may be taken.** — Upon the reading of the deposition in evidence, the same objections may be taken to a question or answer contained therein, as if the witness had been examined orally in court.

Id., § 9.

Objections to the competency of witness. (*In the Matter of Kip*, 1 Paige, 601.)

§ 634. **Attendance of witness for examination, how compelled.** — The attendance of the witness may be enforced, by a subpoena subscribed by the officer, or issued under the seal of the court.

Id., § 10.

§ 635. **Disobedience of witness, how punished.** — Disobedience to the subpoena, or a refusal to be sworn or to testify, may be punished by the court or officer, as prescribed in section six hundred and nineteen.

Id.

If the party refuse to attend and testify he may be punished for contempt. (*Gaughe v. Lardche*, 14 How., 451.)

occupation], and E. F., surety of [stating his place of residence and occupation], hereby, jointly and severally, undertake that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required, upon that [information, presentment, indictment or appeal, as the case may be], and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars" [inserting the sum in which the defendant is admitted to bail].

New in form.

§ 606. **Qualifications of bail, and how put in.** — The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed by sections five hundred and sixty-nine to five hundred and seventy-seven, inclusive.

New.

CHAPTER II.

COMPELLING THE ATTENDANCE OF WITNESSES.

SECTION 607. Subpoena defined.

608. Magistrate may issue subpoenas, on information or presentment.

609. District attorney may issue subpoenas for witnesses before grand jury.

610. He may also issue subpoenas for the people, on trial of an indictment.

611. Clerk may issue blank subpoenas for witnesses for defendant on trial.

612. Form of subpoena.

613. Requirement in subpoena, to produce books, papers and documents.

614. Subpoena, by whom served.

615. How served.

616. Payment of expenses of witness, when he is from without the county, or is poor.

617. Payment of expenses of witness, when he is from without the county, or is poor.

618. Witnesses residing or served with subpoena out of the county, when and how compelled to attend.

619. Disobedience to subpoena, or refusal to be sworn or to testify, how punished.

§ 607. **Subpoena defined.**—The process by which the attendance of a witness before a court or magistrate is required is a subpoena.

New.

§ 608. **Magistrate may issue subpoenas for witnesses before grand jury.**—A magistrate, before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state, either on behalf of the people or of the defendant.

New.

§ 609. **District attorney may issue subpoenas for witnesses before grand jury.**—The district attorney of the county may issue subpoenas, subscribed by him for witnesses within the state, in support of the prosecution or for such other witnesses as the grand jury may direct, to appear before the grand jury, upon an investigation pending before them.

3 R. S., 1019, § 32.

§ 610. **He may also issue subpoenas for the people, on trial of an indictment.**—The district attorney may, in like manner, issue subpoenas subscribed by him, for witnesses within the state in support of an indictment, to appear before the court at which it is to be tried.

3 R. S., 1023, § 66; 2 R. L., 147, § 10.

§ 611. **Clerk may issue blank subpoenas for witnesses for defendant, on trial.**—The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

3 R. S., 1038, § 62; 1 R. L., 497, § 12.

§ 612. **Form of subpoena.**—A subpoena, authorized by the last four sections, must be substantially in the following form:

“In the name of the people of the state of New York:

To A. B.

“You are commanded to appear before *C. D.*, a justice of the peace of the town of _____, [or “the grand jury of the county of _____,” or “the court of sessions of the county of _____,” or

(e) **Materiality of witness.** — An affidavit for a commission is sufficient if it show the witness to be material, as he is advised, and is out of the jurisdiction. (*Brackett v. Dudley*, 1 Cow., 209.)

(f) **Attorney may make application.** — The affidavit may be made by the attorney. (*Murray v. Kirkpatrick*, 1 Cow., 210; *Corbett v. De Comeau*, 54 How., 506.)

Or by a third party. (*Demar v. Van Zant*, 2 Johns. Cas., 69.)

Must be on notice. (*Watson v. Delafeld*, Col. & Caines, 407; 2 Caines, 260.)

(g) **Nature of crime.** — Affidavit must state positively the nature of the crime charged. (See *Tillon v. U. S. L. Ins. Co.*, 52 How., 179; 1 Abb. N. C., 348; *Borman v. Pierce*, 56 How., 251; *Elmore v. Hyde*, 3 Abb. N. C., 129; *Beach v. New York*, 14 Hun, 79; *Webster v. Stockwell*, 3 Abb. N. C., 115.)

§ 640. **If during term, to be made to the court.** — The application, if made during the term, must be made to the court.

3 R. S., 655, §§ 13, 14.

§ 641. **If not during term, to whom to be made.** — If not made during the term, the application may be made as follows:

1. When the indictment is pending in a court of oyer and terminer, or in a court of sessions, except in the city and county of New York, to a judge of the supreme court or to the county judge;

2. When the indictment is pending in the court of general sessions in the city and county of New York, to the recorder or city judge or judge of general sessions, or one of the judges of the court of common pleas of that city;

3. When the indictment is pending in a city court, to the recorder or judge of the court in which it is pending.

New.

§ 642. (Amended 1882.) **Notice of application, when required and how given.** — If the application be made to the court, it may be without notice to the district attorney, unless the court direct notice to be given, in which case it must prescribe the manner of giving the same. If made to one of the officers mentioned in the last section, the application must be upon five days' notice to the district attorney served, with a copy of the affidavit upon which it is founded.

New.

Ordinarily it must be on notice. (*Watson v. Delafeld*, Col. & Caines, 407. 2 Caines, 260.)

§ 643. **Order for commission, when granted.** — If the court or officer to whom the application is made be satisfied that the witness resides out of the state, and that his examination is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and that the people be permitted to join in the commission, and to examine witnesses in support of the indictment.

3 R. S., 1025, § 77.

(a) **Must name commissioners.** — The order for the commission must name the commissioners. (*Harris v. Wilson*, 2 Wend., 627; *Townsend v. N. Y. Ins. Co.*, 1 Caines, 4.)

Who may act as such. (*Lewis v. Van Loon*, 3 Caines, 105.)

(b) **Need not be under seal.** — The counsel for the respective parties may waive the requirement that a commission must be under seal of the court. (*Churchill v. Carter*, 15 Hun, 385.)

The clerk's signature not essential. (*Goodyear v. Vosburgh*, 41 How., 421.)

Nor seal. (*Tracy v. Suydam*, 80 Barb. 110; *Whitney v. Wyncoop*, 4 Abb., 370.)

§ 644. **Trial to be staid until execution and return of commission.** — If the application for a commission be granted, the court or judge must insert in the order therefor, a direction that the trial of the indictment be staid for a specified time, reasonably sufficient for the execution and return of the commission.

3 R. S., 1025, § 78.

When stay will be vacated. (*Voss v. Fielden*, 2 Sandf., 690.)

§ 645. **Interrogatories, and notice of settlement.** — When the commission is ordered, the defendant must serve upon the district attorney, and the district attorney, if he intend to join in the commission and examine witnesses in support of the indictment, must serve upon the defendant or his counsel, a copy of the interrogatories to be annexed thereto, with a notice of two days of their settlement, before an officer who might have granted the order out of term, as provided in section six hundred and forty-one.

Id.

(a) **Interrogatories, return of.** — The direction of the manner of returning the interrogatories must be signed by the officer settling the interrogatories. (*Crawford v. Loper*, 25 Barb., 449.)

(b) **Settlement of.** — On settling the interrogatories the judge should allow only such as are pertinent to the issue. (*McDonald v. Garrison*, 2 Hilt., 510; 9 Abb., 178; *Blaesdell v. Raymond*, Id., 178, n.)

(c) **Indorsement of allowance.** — An indorsement on the commission of the allowance of the interrogatories is sufficient, if it refer to them as annexed. (*Halleran v. Field*, 23 Wend., 38.)

(d) **Signed by counsel.** — It is enough that the interrogatories be signed by counsel. (*Horner v. Martin*, 6 Cow. 156.)

§ 646. **Cross-interrogatories, and notice of settlement.** — The district attorney, and the defendant, may, in the same manner, serve cross-interrogatories, to be annexed to the commission, with the like notice of the settlement thereof.

Id.

§ 647. **What may be inserted in interrogatories.** — In the interrogatories, either party may insert any question pertinent to the issue.

Id.

(a) **Only such as are pertinent allowed.** — On settling the interrogatories it is the duty of the judge to allow only such as are pertinent. (*McDonald v. Garrison*, 2 Hilt., 510; 9 Abb., 178; *Blaesdell v. Raymond*, Id., 178, n.)

It is enough that the interrogatories be signed by counsel. (*Horner v. Martin*, 6 Cow., 156.)

§ 648. **What may be inserted in interrogatories.** — Upon the settlement of the interrogatories, the judge must expunge every question not pertinent to the issue, and modify the questions, so as to conform them to the rules of evidence, and when settled, must indorse upon them his allowance, and annex them to the commission.

3 R. S., 1025, § 78.

§ 649. **Direction as to return of commission.** — Unless the parties otherwise consent, by an indorsement upon the commission, the officer must indorse thereon a direction, as to the manner in which it must be returned; and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the indictment is pending, designating his name and the place where his office is kept.

3 R. S., 665, § 16.

(a) **Directions must be complied with.** — Unless returned as directed, it cannot be read. (*Richardson v. Gere*, 21 Wend., 156.)

(b) **May stipulate as to mode of return.** — It is sufficient if the return be directed in the mode stipulated by the parties. (*Williams v. Eldridge*, 1 Hilt., 249.)

(c) **May be returned to the clerk.**—A commission not vitiated by being returned to the clerk of the original county after the place of trial has been changed. (*Whitney v. Wyncoop*, 4 Abb., 870.)

(d) **When delivered to an attorney.**—No objection that it was delivered to an attorney at the post-office and by him conveyed to the county clerk's office. (*Horner v. Martin*, 6 Cow., 156; see *Halleran v. Field*, 23 Wend., 88.)

(e) **No indorsement required.**—The commissioners need not indorse on the envelope that they deposited the same in the post-office. (*Brunskill v. James*, 11 N. Y., 294; *Hall v. Barton*, 25 Barb., 274.)

§ 650. **Commission, how executed.**—The commissioners, or any one of them, unless otherwise specially directed, may execute the commission as follows :

1. They must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth ;

2. They must cause the examination of the witness to be reduced to writing ;

3. They must write the answers of the witness, as nearly as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it, until it is made conformable to what he declares is the truth ;

4. If the witness decline answering a question, that fact, with the reason for which he declines answering it, as he gives it, must be stated ;

5. If papers or documents are produced before them, and proved by the witness, they must be annexed to his deposition, and be subscribed by the witness and certified by the commissioners ;

6. The commissioners must subscribe their names to each sheet of the deposition, and annex the deposition, with the papers or documents proved by the witness, to the commission, and must close it up under seal and address it, as directed thereon ;

7. If there be a direction on the commission, to return it by mail, the commissioners must immediately deposit it in the nearest post-office. If any other direction be made, by the written consent of the parties, or by the officer, on the commission, as to its return, they must comply with the direction.

Id., § 17.

(a) **One commissioner.**—One commissioner may, in certain cases, execute. (*Leech v. A. M. Ins. Co.*, 4 Daly, 518.)

(b) **Witness must be examined under oath.**—Commissioners must certify that witnesses were examined under oath. (*Bailes v. Cochran*, 2 Johns., 417; *Whitney v. Wyncoop*, 4 Abb., 870.)

(c) **Witnesses, how sworn.** — Witnesses may be sworn by the local authorities if the law of the place forbid the commissioners from administering oath. (*Lincoln v. Battelle*, 6 Wend., 475.)

Oath should be publicly administered. (*Halleran v. Field*, 23 Wend., 386.)

(d) **Jurat.** — The jurat must be signed by the commissioners, with their names of office. (*Root v. Stiles*, Col. & Caines, 468; 8 Caines, 128.)

(e) **Interpreter.** — An interpreter may be employed when necessary. (*Leech v. A. M. Ins. Co.*, 4 Daly, 518.)

(f) **Must answer specifically.** — Witness must answer each question specifically. (*Union Bank v. Torrey*, 5 Duer, 626; 2 Abb., 269; *Percival v. Hickey*, 18 Johns., 257.)

Witness may state any fact material, though detrimental to the party interrogating. (*Van Ness v. Bush*, 14 Abb., 33.)

(g) **Cross-interrogatory.** — Where a cross-interrogatory is not properly answered the deposition cannot be read unless the defect is waived. (*Kimball v. Davis*, 19 Wend., 487.)

(h) **May appear by counsel.** — Parties have a right to appear by counsel. (*Union Bank v. Torrey*, 5 Duer, 626; 2 Abb., 269.)

(i) **Must answer from memory.** — Witness not allowed to read his answer from a paper before prepared. (*Creamer v. Jackson*, 4 Abb., 418; *Commercial Bank v. Union Bank*, 11 N. Y., 203; 19 Barb., 391.)

(j) **Exhibits.** — As to paper introduced as an exhibit. (*Howard v. O. M. Ins. Co.*, 9 Bos.; 645; *Brunskill v. James*, 11 N. Y., 294.)

(k) **Corrected commission.** — The court may send back for correction a defective commission. (*Keeler v. Vanderpoel*, 1 Code R. [N. S.], 289.)

(l) **Motion to suppress.** — A motion to suppress or send back for correction cannot be made at the trial. (*Gates v. Beecher*, 3 S. C., 404.)

(m) **Evasive answers.** — An answer, though not full sufficient, if not clearly evasive. (*Baker v. Spencer*, 47 N. Y., 562; *Terry v. McNeil*, 58 Barb., 241.)

(n) **Uncertainty as to name.** — Where there are two persons of the same name of the commissioner selected, an objection that it was not executed by the proper person cannot be raised for the first time at the trial. (*Newton v. Porter*, 69 N. Y., 133.)

(o) **Legally sworn.** — If the commissioner return that the witness was sworn, it will be presumed that he was legally sworn. (*Bishop v. Ferguson*, 46 N. Y., 688.)

§ 651. Copy of last section to be annexed to commission.

A copy of the last section must be annexed to the commission.

8 R. S., 655, § 17.

§ 652. **Commission, how returned, when delivered to agent for that purpose.** — If the commission and return be delivered by the commissioners to an agent, he must deliver it to the clerk to whom it is directed, or to a judge of the court in

which the indictment is pending, by whom it may be received and opened, upon the affidavit of the agent that he received it from the hands of one of the commissioners, and that it has not been opened or altered since he received it.

Id., § 18.

(a) **Agent's affidavit.**— In such a case the agent's affidavit is indispensable. (*Dwinelle v. Howland*, 1 Abb., 87.)

(b) **Commission delivered to an attorney.**— No objection to the return of a commission that it was delivered at the post-office to the attorney of one of the parties, who conveyed it to the clerk's office, there being no suspicion of abuse. (*Horner v. Martin*, 6 Cow., 156.)

§ 653. **Commission, how returned, when delivered to agent for that purpose.**— If the agent be dead, or from sickness or other casualty, unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty, unable to deliver it, that it has not been opened or altered since the person making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioners.

Id., § 19.

§ 654. **When and how filed.**— The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending.

Id., § 20.

A deposition cannot be read in evidence until actually filed in the clerk's office. (*Parker v. Holby*, 20 Johns., 357; *Oneida Mfg. Society v. Lawrence*, 4 Cow., 440.)

§ 655. **Commission returned by mail, how disposed of.** If the commission and return be transmitted by mail, the clerk to whom it is addressed must open and file it in his office, where it must remain, unless the court otherwise direct.

Id., § 21.

(a) **When returned by mail.**— A commission returned by mail addressed to the clerk cannot be read, unless an order were made for its return in that manner. (*Richardson v. Gers*, 21 Wend., 156.)

(b) **When deposited.** — It is no objection that they were not deposited in the post-office immediately after they were taken. (*Halleran v. Field*, 23 Wend., 38.)

(c) **Indorsement on envelope.** — The commissioners need not indorse on the envelope a certificate that that they deposited the return in the post-office. (*Brunskill v. James*, 11 N. Y., 294; *Hall v. Barton*, 25 Barb., 274.)

(d) **Must be filed.** — A deposition cannot be read until actually filed. (*Parker v. Holby*, 20 Johns., 357; *Oneida, etc., v. Lawrence*, 4 Cow., 440.)

§ 656. **Commission and return to be opened for inspection, and copies to be furnished.** — The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same, or of any part thereof, on payment of his fees, at the rate of five cents for every hundred words.

Id., § 28.

§ 657. **Deposition to be read in evidence; what objections may be taken thereto.** — The deposition, taken under the commission, may be read in evidence by either party on the trial, and the same objections may be taken to a question in the interrogatories, or to an answer in the deposition, as if the witness had been examined orally in court.

Id., § 24.

(a) **Formal defects.** — Mere formal defects which are wholly immaterial may be disregarded. (*Rust v. Eckler*, 41 N. Y., 488.)

(b) **Substantial compliance with statute.** — Where the statute has been substantially complied with, and the prisoner is not prejudiced, it is sufficient. (*Goodyear v. Vosburgh*, 41 How., 421; *Hall v. Barton*, 25 Barb., 274; *McCleary v. Edwards*, 27 id., 239.)

(c) **Suppressing return.** — The absence of the return which the statute requires to be indorsed on the commission, is not a ground for suppressing the deposition on motion. (*Creamer v. Jackson*, 4 Abb., 413.)

(d) **Must have seal.** — A commission issued without a seal is a nullity, and the depositions taken under it cannot be read in evidence. (*Ford v. Williams*, 24 N. Y., 359.)

(e) **Must be filed.** — Nor until filed in the clerk's office. (*Parker v. Holby*, 20 Johns., 357; *Oneida M'f'g. Society v. Lawrence*, 4 Cow., 440.)

(f) **Either party may read.** — The deposition may be read by either party. (*Weber v. Kingsland*, 8 Bos., 415.)

The informal party may be excluded. (*Commercial Bank v. Union Bank*, 11 N. Y., 203.)

(g) **Objections.** — Objections taken must point out the error complained of. (*Dalton v. National Soc., etc.*, 20 N. Y., 32.)

(h) When answers will be excluded. (*Lansing v. Cooley*, 13 Abb., 272; *Railway, etc., v. Warner*, 1 S. C., 21; *Fussen v. Hubbard*, 55 N. Y., 465; *Heineman v. Hurd*, 2 Hun 324; *Meyer v. Levy*, 54 How., 274.)

(i) Objections, when made. — An objection to the interrogatories cannot be made on the trial. (*Frances v. Ocean Ins. Co.*, 6 Cow., 404; 2 Wend., 64; *Hall v. Barton*, 25 Barb., 274.)

(j) Rejection of deposition. — If the witness refuse to answer a cross-interrogatory the whole deposition may be rejected. (*Smith v. Griffith*, 3 Hill, 838.)

(k) Motion to suppress. — An objection that some of the interrogatories are not fully answered must be made as soon as discovered, on a motion to suppress. (*Vilmar v. Schall*, 3 J. & Sp., 67; 61 N. Y., 688.)

(l) Inadmissibility of evidence. — The inadmissibility of evidence is the proper ground for such a motion. (*Howard v. Orient M. Ins. Co.*, 9 Bos., 645.)

(m) Cross-interrogatory. — A deposition will not be suppressed because an answer to a cross-interrogatory is not full. (*Baker v. Spencer*, 47 N. Y., 562.)

An answer not responsive may be excluded on objection. (*Lansing v. Cooley*, 13 Abb., 272.)

(n) Answer not responsive. — An answer not responsive will be excluded. (*Railway Pass. Ass. Co. v. Warner*, 1 S. C., 21, add.)

(o) Competent testimony. — Testimony otherwise competent not to be rejected. (*Fussin v. Hubbard*, 55 N. Y., 465.)

(p) Answer and cross-interrogatories. — If the answer of a witness to a direct interrogatory be properly excluded, all cross-interrogatories must also be, if dependent thereon. (*Flemming v. Hollenback*, 7 Barb., 271.)

(q) When stricken out. — The deposition will be stricken out on the trial if evasive or untruthful, or if the witness has not fully and fairly answered the cross-interrogatories. (*Terry v. McNeil*, 58 Barb., 241.)

(r) Leading questions. — An objection to a question as leading must be made on settlement of the interrogatories, or it is waived. (*Hazlewood v. Heminway*, 3 S. C., 787.)

(s) Deposition may be read, though witness is in court. — A party who has taken the testimony of a witness residing abroad, under a commission, may read the deposition, though the witness be in court; he is not bound to call the witness, but he may be called and examined by the other side. (*Phoenix v. Baldwin*, 14 Wend., 62.)

(t) Original commission must be used. — The original commission must be used when the cause is tried in the county to which it is returned. In another county an authenticated copy may be used. (*Bishop v. Ferguson*, 46 N. Y., 688.)

(u) Either party may read cross-interrogatories. — The party who took the commission may read the answers to the cross-interrogatories, though the other party object. (*Marshal v. Watertown S. E. Co.*, 10 Hun, 463.)

(v) Opinion of witness. — When the answer is leading, and the answer is the expression of the judgment of the witness upon the fact, it cannot be read upon the trial. (*Meyer v. Levy*, 54 How., 274.)

(*w*) **When witness peruses both sets of questions.** — The mere fact that the witness was permitted to peruse both sets of interrogatories, prior to his examination, not sufficient ground for the rejection of the evidence. (*Butler v. Flanders*, 56 How., 312.)

(*x*) **Discretionary power of court.** — The court has discretionary power upon objections. (*Cope v. Sibley*, 12 Barb., 521; *Hazlewood v. Hemmway*, 3 S. C., 787.)

(*y*) **Two persons of same name.** — Where there were two persons by the name of the commissioner selected, an objection that it was not executed by the proper person cannot be raised for the first time at the trial. (*Newton v. Porter*, 69 N. Y., 183.)

CHAPTER V.

INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE OR DURING THE TRIAL, OR AFTER CONVICTION.

SECTION 658. Appointment of commission; their proceedings.

659. If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety.

660. If defendant committed, bail exonerated or deposit of money refunded.

661. Detention of defendant in asylum, and proceedings on his becoming sane.

662. Expenses incident to sending defendant to asylum, how paid.

§ 658. Appointment of commission ; their proceedings.

When a defendant pleads insanity, as prescribed in section three hundred and thirty-six, the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons to examine him and report to the court as to his sanity at the time of the commission of the crime.

If a defendant in confinement, under indictment, appears to be, at any time before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a like commission to examine him and report to the court as to his sanity at the time of the examination.

The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the Code of Civil Procedure to be taken by referees. They must be attended by the district attorney of the county, and may

call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon.

2 R. S., 845, §§ 20, 21.

As to form of commissioner's oath, see Code Civil Procedure, § 1016.

§ 659. If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety. — If the commission find the defendant insane, the trial of judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a state lunatic asylum; and that upon his becoming sane, he be re-delivered by the superintendent of the asylum to the sheriff.

Id.

§ 660. If defendant committed, bail exonerated or deposit of money refunded. — The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

New.

§ 661. Detention of defendant in asylum, and proceedings on his becoming sane. — If the defendant be received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give a written notice of that fact to a judge of the supreme court of the district in which the asylum is situated. The judge must require the sheriff without delay to bring the defendant from the asylum and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged.

2 R. S., 847, § 81.

§ 662. Expenses incident to sending defendant to asylum, how paid. — The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are,

in the first instance, chargeable to the county from which he was sent; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county, bound to provide for and maintain him elsewhere.

2 R. S., 848, § 82.

CHAPTER VI.

COMPROMISING CERTAIN CRIMES, BY LEAVE OF THE COURT.

SECTION 663. Certain crimes, for which the party injured has a civil action, may be compromised.

664. Compromise to be by permission of the court; order thereon.

665. Order, a bar to another prosecution.

666. No public offense to be compromised, except as provided in this chapter.

§ 663. **Certain crimes for which the party injured has a civil action, may be compromised.** — When a defendant is held to answer, on a charge of a misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in the next section, except when it was committed,

1. By or upon an officer of justice, while in the execution of the duties of his office;

2. Riotously; or

3. With an intent to commit a felony.

3 R. S., 1024, §§ 70, 73.

§ 664. **Compromise to be by permission of the court; order thereon.** — If the party injured appear before the court, to which the depositions and statement are required, by section two hundred and twenty-one, to be returned, at any time before trial on an indictment for the crime, and acknowledged in writing that he has received satisfaction for the injury, the court may, in its discretion, and on payment of the costs incurred, if it shall see fit so to direct, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes.

Id.

A misdemeanor cannot be compounded by the parties unless by consent of the court or with the approbation of the district attorney. (*Gilmore's case*, 2 C. H. Rec., 29.)

(a) **After conviction.** — An assault and battery cannot be compromised after conviction. (*People v. Bishop*, 5 Wend., 111.)

(b) **Trial for compounding felony.** — On the trial of an indictment for compounding a larceny, the acquittal of the principal offender is no defense. (*People v. Buckland*, 13 Wend., 592.)

A trial for an assault and battery will not be stayed because a civil action is pending, but conviction and sentence may be had. (*People v. Judges of Tennessee*, 13 Johns., 85.)

(c) **Note given in settlement void.** — A note given in settlement of a crime punishable in a state prison is void. (*Couchman v. Trenchard*, 58 Barb., 165.)

§ 665. **Order a bar to another prosecution.** — The order authorized by the last section is a bar to another prosecution for the same offense.

Id., § 72.

§ 666. **No public offense to be compromised, except as provided in this chapter.** — No crime can be compromised, nor can any proceeding for the prosecution or punishment thereof upon a compromise be staid, except as provided in sections six hundred and sixty-three and six hundred and sixty-four.

New. (See Penal Code, § 125 *et seq.*)

CHAPTER II.

DISMISSAL OF THE ACTION, BEFORE OR AFTER INDIOTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 667. Dismissal, when a person held to answer is not indicted at the next term thereafter.

668. When a person indicted is not brought to trial at the next term thereafter.

669. Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail.

670. If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded.

671. Court may order indictment to be dismissed.

672. *Nolle prosequi* abolished; no indictment to be dismissed or abandoned, except according to this chapter.

673. Dismissal, a bar, in misdemeanor, but not in felony.

§ 667. **Dismissal, when a person held to answer is not indicted at the next term thereafter.** — When a person has

been held to answer for a crime, if an indictment be not found against him, at the next term of the court at which he is held to answer, the court may, on application of the defendant, order the prosecution to be dismissed, unless good cause to the contrary be shown.

§ R. S., 1046, § 59.

§ 668. When a person indicted is not brought to trial at the next term thereafter. — If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

§ R. S., 1081, §§ 34, 35.

§ 669. Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail. — If the defendant be not indicted or tried, as provided in the last two sections, and sufficient reason therefor be shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody, on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

Id., § 36.

§ 670. If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded. — If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

New.

§ 671. Court may order indictment to be dismissed. — The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.

New.

§ 672. **Nolle prosequi abolished; no indictment to be dismissed or abandoned except according to this chapter.** — The entry of a *nolle prosequi* is abolished; and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section.

3 R. S., 1022, § 56.

§ 673. **Dismissal, a bar in misdemeanor, but not in felony.** — An order for the dismissal of the action, as provided in this chapter, is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar, if the offense charged be a felony.

New. (See § 9, *ante*, and cases there cited.)

CHAPTER VIII.

REMITTING THE PUNISHMENT IN CERTAIN CASES.

SECTION 674. Punishment, upon conviction of a master of a vessel from a foreign country.

§ 674. **Punishment, upon conviction of a master of a vessel from a foreign country.** — When the master of a vessel arriving from a foreign country is convicted of having knowingly brought a person convicted therein of a crime, which, if committed in this state, would be a felony, to a place within the state, the court before which the conviction is had may, if satisfied that the defendant has reconveyed the convict to the place from which he took him, and on payment of the costs of prosecution, order the punishment upon the conviction to be remitted.

3 R. S., 978, §§ 67, 68 : Laws 1833, ch. 230, §§ 1, 2.

CHAPTER IX.

PROCEEDINGS AGAINST CORPORATIONS.

SECTION 675. Summons upon an information or presentment against a corporation, by whom issued, and when returnable.

676 Form of the summons.

677. When and how served.

678. Examination of the charge.

679. Certificate of the magistrate, and return thereof with the depositions.

680. Grand jury may proceed as in the case of a natural person.

681. Appearance, and plea to indictment, and proceedings thereon.

682. Fine, on conviction, how collected.

§ 675. Summons upon an information or presentment against a corporation, by whom issued, and when returnable.— Upon an information against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge; the time to be not less than ten days after the issuing of the summons.

3 R. S., 1046, §§ 56, 57, 58.

§ 676. Form of the summons.— The summons must be in substantially the following form :

“County of *Albany*, [or as the case may be.]

“In the name of the people of the state of New York :

“To the [naming the corporation.]

“You are hereby summoned to appear before me, at [naming the place,] on [specifying the day and hour,] to answer a charge made against you, upon *the information of A. B.*, for [designating the offense, generally.]

“Dated at the *city*, [or ‘town,’] of _____, the _____ day of _____, 18 _____.

G. H., *Justice of the peace.*”

[Or as the case may be.]

New in form. (See Id.)

§ 677. When and how served.— The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to

the president, or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

Id.

§ 678. **Examination of the charge.**—At the time appointed in the summons, the magistrate must proceed to investigate the charge, in the same manner as in the case of a natural person brought before him, so far as those proceedings are applicable.

Id.

§ 679. **Certificate of the magistrate, and return thereof with the depositions.**—After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate, in the manner prescribed in section two hundred and twenty-one.

Id.

§ 680. **Grand jury may proceed as in the case of a natural person.**—If the magistrate return a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon, as in the case of a natural person held to answer.

Id.

§ 681. **Appearance, and plea to indictment, and proceedings thereon.**—If an indictment be found against a corporation, it may appear by counsel, to answer the same. If it do not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases.

Id.

§ 682. **Fine, on conviction, how collected.**—When a fine is imposed upon a corporation, on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of their real and personal property, in the same manner as upon an execution in a civil action.

Id.

CHAPTER X.

ENTITLING AFFIDAVITS.

SECTION 683. Affidavits defectively entitled, valid.

§ 683. **Affidavits defectively entitled, valid.** — It is not necessary to entitle an affidavit or deposition, in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose, as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal in which it is made.

New.

(a) **Omission of name.** — An affidavit is not defective because the christian name of a party is omitted from the title. (*Maury v. Van Arnum*, 1 Hill, 370.)

(b) **Unsigned affidavit.** — An affidavit need not be signed by deponent. (*Hall v. Spicer*, Col. & Caines, 495; 3 Caines, 150; *Kenyon v. Virgil*, 3 Johns., 540; *Soule v. Chase*, 1 Rob., 222; 1 Abb. [N. S.], 48.)

(c) **Title of office.** — An affidavit is *prima facie* sufficient if by the officer before whom it is taken, though he omit the title of his office. (*Hunter v. Lacorde*, 6 Cow., 728; *People v. Rens. Common Pleas.*, 6 Wend., 543.)

(d) **Need not state that deponent appeared.** — Also good though the officer do not expressly state that deponent appeared before him. (*Morritt v. Guman*, 2 Cow., 552.)

CHAPTER XI.

ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS.

SECTION 684. Errors, etc., when not material.

§ 684. **Errors, etc., when not material.** — Neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor an error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right.

New.

CHAPTER XII.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

SECTION 685. When property, alleged to be stolen or embezzled, comes into custody of peace officer.

686. Order for its delivery to owner.

687. When it comes into custody of magistrate, he must deliver it to owner, on proof of title and payment of expenses.

688. Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner.

689. If not claimed in six months, to be delivered to county superintendent of the poor, or in New York, to commissioners of charities and corrections.

690. Receipt for money or property taken from a person arrested for a public offense.

691. Duties of police clerks in the city of New York, etc.

§ 685. **When property, alleged to be stolen or embezzled, comes into custody of peace officer.**—When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it, subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

3 R. S., 1046, § 51.

§ 686. **Order for its delivery to owner.** — On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner, unless its temporary retention be deemed necessary in furtherance of justice, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

Id., 53.

The magistrate before whom the property is brought, has authority to order the delivery thereof to the party entitled to it. (*Houghton v. Backman et al.*, 47 Barb., 388.)

§ 687. **When it comes into custody of magistrate, he must deliver it to owner on proof of title and payment of expenses.** — If property stolen or embezzled come into the custody of a magistrate, it must, unless its temporary retention

be deemed necessary in furtherance of justice, be delivered to the owner, on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

Id., § 53; see *Haughton v. Backman et al.*, 47 Barb., 898.

§ 688. **Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner.**— If property stolen or embezzled have not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

Id., § 54.

§ 689. **If not claimed in six months, to be delivered to county superintendent of the poor, or, in New York, to commissioners of charities and corrections.**— If property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred in its preservation, deliver it to the county superintendents of the poor, or, in the city of New York, to the commissioners of charities and corrections, to be applied for the benefit of the poor of the county or city, as the case may be.

Id., § 55.

§ 690. **Receipt for money or property taken from a person arrested for a public offense.**— Except in the city of New York, when money or other property is taken from a defendant, arrested upon a charge of a crime, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the depositions and statement must be sent, as provided in section two hundred and twenty-one.

New

§ 691. **Duties of police clerks in the city of New York, etc.**—The commissioners of police of the city of New York may designate some person to take charge of all property alleged to

be stolen or embezzled, and which may be brought into the police office, and all property taken from the person of a prisoner, and may prescribe regulations in regard to the duties of the clerk or clerks so designated, and to require and take security for the faithful performance of the duties imposed by this section; and it shall be the duty of every officer into whose possession such property may come to deliver the same forthwith to the person so designated.

New.

CHAPTER XIII.

REPRIEVES, COMMUTATIONS AND PARDONS.

SECTION 692. Power of governor to grant reprieves, commutations and pardons.

693. His power, in respect to convictions for treason; duty of the legislature in such cases.

694. Governor to communicate annually to legislature, reprieves, commutations and pardons.

695. Report of case; how and from whom required.

696.

697. } Repealed in 1882.

698.

§ 692. Power of governor to grant reprieves, commutations and pardons. — The governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this chapter.

N. Y., Const., art. IV., § 5.

(a) **Void provision.** — A provision in a pardon that it shall not remove disabilities is void. (*People v. Pease*, 8 Johns. Cas., 333.)

(b) **Effect of pardon.** — Pardon of one imprisoned for life does not restore the rights of previous marriage or guardianship. (3 R. S., 189, § 7.)

(c) **Fraudulently obtained pardon.** — The court cannot go behind a pardon, though fraudulently obtained. (*In re Endymoin*, 8 How., 478.)

(d) **Conditional pardon and breach thereof.** — In case of breach of a conditional pardon, the recipient may be remanded, and the original sentence executed. (*People v. Potter*, 1 Park., 47.)

§ 693. **His power, in respect to convictions for treason ; duty of the legislature in such cases.** — He may also suspend the execution of the sentence, upon a conviction for treason, until the case can be reported to the legislature, at its next meeting, when the legislature must either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.

Id.

§ 694. **Governor to communicate annually to legislature, reprieves, commutations and pardons.** — He must annually communicate to the legislature, each case of reprieve, commutation or pardon ; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

Id.

§ 695. **Report of case ; how and from whom required.** When an application is made to the governor for a pardon, he may require the presiding judge of the court before which the conviction was had, or the district attorney by whom the action was prosecuted, to furnish him without delay, with a statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing the pardon.

8 R. S., 1044, § 89.

§ 696. **Notice to district attorney, of application for pardon.** — At least ten days before the governor acts upon an application for a pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the district attorney of the county where the conviction was had, and proof, by affidavit, of the service must be presented to the governor. (This section repealed in 1882.)

Id., § 40; Laws 1849, ch. 810.

§ 697. **Publication of notice.** — Unless dispensed with by the governor, a copy of the notice must also be published, for thirty days from the first publication, in the state paper, if there be one, and in a paper in the county in which the conviction was had, nearest to the place of conviction ; and in the city of New York, in a paper designated by the governor, with reference to its having the largest circulation. (This section repealed in 1882.)

Id., § 41.

§ 698. **Papers relating to application, to be filed with secretary of state.** — When the governor grants a reprieve, commutation or pardon, he must, within ten days thereafter, file all the papers presented to him in relation thereto, in the office of the secretary of state, by whom they must be kept as records open to public inspection. (This section repealed in 1882.)

New.

PART V.

OF PROCEEDINGS IN COURTS OF SPECIAL SESSIONS AND
POLICE COURTS.

- TITLE I. OF THE PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN
THE COUNTIES OTHER THAN NEW YORK.**
- II. OF THE PROCEEDINGS IN THE COURTS OF SPECIAL SES-
SIONS IN THE CITY AND COUNTY OF NEW YORK.**
- III. OF APPEALS FROM THE COURTS OF SPECIAL SESSIONS.**

TITLE I.

OF PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN THE
COUNTIES OTHER THAN NEW YORK.

- SECTION 699.** Charge to be read to defendant, and he required to plead.
700. The plea, and how put in.
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712. Trial, how conducted.
713. Jury may decide in court, or retire; oath of officer on their
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SECTION 724. Certificate, conclusive evidence.

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§ 699. (Amended 1882.) **Charge to be read to defendant, and he required to plead.**—In the cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the charge against him must be distinctly read to him, and he must be required to plead thereto.

3 R. S., 1006, § 7; 2 R. L., 508, § 4.

§ 700. **The plea, and how put in.**—The defendant may plead the same pleas as upon an indictment, as provided in section three hundred and thirty-two. His plea must be oral, and entered upon the minutes of the court.

Id., see § 332, *ante*, and cases there cited.

§ 701. **Issue, how tried.**—Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the court must proceed to try the issue.

Id., § 8.

(a) **Waiver of right to jury.**—It is not essential to a valid conviction that the court inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. (*People v. Goodwin*, 5 Wend., 251.)

(b) **Court of special sessions.**—A court of special sessions can only acquire jurisdiction over the person of the accused upon his request to be tried before it, or his omission for the space of twenty-four hours to give bail for his appearance. (*People v. Berberich*, 20 Barb., 224; 11 How., 287; see *People v. Fisher*, 20 Barb., 652; 2 Park., 402; overruled in *Wynshamer v. People*, 18 N. Y., 378.)

(c) **Prisoner must expressly waive right.** — *Held*, that it should affirmatively appear on the record that the prisoner expressly waived his right to trial by jury. (*People v. Mallon*, 39 How., 454.)

(d) **Effect of election.** — By an election to be tried by the special sessions the defendant waives all objections to the jurisdiction of the court. (*Gill v. People*, 3 Hun, 187; 5 S. C., 308.)

(e) **Infant may waive.** — An infant may waive a jury trial. (*Sammons v. Wardell*, 21 Hun, 515.)

(f) **Jurisdiction of special sessions.** — Special sessions has no jurisdiction of the fraudulent removal of a debtor's property, unless the value be less than fifty dollars. (*Thomas v. People*, 19 Wend., 480; *Powers v. People*, 4 Johns., 292.)

(g) **Erroneous conviction; petit larceny.** — A conviction for petit larceny is erroneous if neither the complaint nor the warrant show the value of the property nor the place where the offense was committed. (*Howell v. People*, 2 Hill, 281.)

(h) **Id.** — Special sessions have jurisdiction of petit larceny. (*People v. Rawson*, 61 Barb., 619.)

(i) **Cheating.** — Also of the offense of cheating. (*People v. Miller*, 14 Johns., 371.)

But not of malicious mischief. (*Wait v. Green*, 5 Park., 185.)

(j) **Disorderly person.** — Cannot try and punish as a disorderly person. (*People v. Carroll*, 3 Park., 73.)

§ 702. **Defendant may demand a trial by jury.** — Before the court hears any testimony upon the trial, the defendant may demand a trial by jury.

Id.

(a) **Must expressly waive trial by jury.** — The jurisdiction of the special sessions cannot be sustained unless it affirmatively appear on the face of the record that the prisoner expressly waived his right to a trial by jury. (*People v. Mallon*, 39 How., 454.)

(b) **Prisoner must request to be tried by sessions.** — Can only gain jurisdiction over the person of the accused upon his request to be tried before it, or his omission for the space of twenty-four hours to give bail for his appearance. (*People v. Berberich*, 20 Barb., 224; 11 How., 289.)

(c) **One tried for selling intoxicating liquors may have jury trial.** — One accused before a court of special sessions of selling intoxicating liquors in violation of law is entitled to a jury trial. (*People v. Baird*, 11 Hun, 289.)

(d) **Must elect to be tried by sessions.** — Must distinctly elect to be tried by special sessions. (*People v. Leid*, 19 Alb. L. J., 400.)

§ 703. (Amended 1882.) **Jury, how summoned.** — If a trial by jury be demanded, the court shall issue an order directed to any constable of the county or marshal of the city where the offense is to be tried, and having authority to execute process from

the court, commanding him to summon twelve good and lawful men, qualified to serve as jurors, and not exempt from such service by law, and who shall be in nowise of kin, either to the complainant or the defendant, to appear before such court, at a time not more than three days from the date of the order, and at a place to be named therein, to make a jury for the trial of such offense.

Id., § 9.

§ 704. Summoning the jury, and returning the list. — The officer to whom such order shall be delivered shall execute the same fairly and impartially, and shall not summon any person whom he shall suspect to be biased or prejudiced for or against the defendant. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the order and return with it to the court.

Id., § 10.

§ 705. Depositing ballots in box. — The names of the persons returned as jurors must be written on separate ballots, folded as nearly alike as possible, so that the name cannot be seen, and must, under the direction of the court, be deposited in a box or other convenient thing.

Id., § 11.

§ 706. Drawing the jury. — The court must then draw out six of the ballots, successively; and if any of the persons whose names are drawn do not appear, or are challenged and set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

Id., § 12.

(a) **Must have a jury of six.** — The special sessions have no authority to try a person by a jury of less than six, though both parties consent thereto. (*Germond v. People*, 1 Hill, 848.)

(b) **Jury may be discharged on disagreement.** — If one jury cannot agree, the court may discharge them and summon another. (*Vanderwerker v. People*, 5 Wend., 530.)

(c) **Number of jurors.** — When a jury may consist of six persons. (*People ex rel. Eckler v. Clark*, 28 Hun, 374.)

(d) **Jurisdiction of court may be increased by statute.** — A statute increasing the jurisdiction of certain courts, is not unconstitutional merely because it transfers a class of cases from courts of record where juries are composed of twelve men to justices' courts, where they consist of six men. (*Dawson v. Horan*, 51 Barb., 459; *People ex rel. Met. Board of Health*, 6 Abb. [N. S.], 105.)

(e) **Common-law right to jury.** — The right to a common-law jury trial extends only to cases in which it had been exercised before the adoption of the original Constitution. (*Duffy v. People*, 6 Hill, 75.)

§ 707. **Challenges.** — The same challenges may be taken by either party, to the panel of jurors or to an individual juror, as on the trial of an indictment for a misdemeanor, so far as applicable; and the challenge must, in all cases, be tried by the court.

Id., § 12.

§ 708. **Talesmen, when and how ordered and summoned.** — If six of the jurors summoned do not attend, or be not obtained, the court may direct the officer to summon any of the bystanders, or others who may be competent, and against whom there is no sufficient cause of challenge, to act as jurors.

Id., § 13.

§ 709. (Amended 1882.) **Punishing officer for not returning list, and issuing new order for jury.** — If the officer to whom the order is delivered do not return it, as required by section seven hundred and four, he may be punished by the court, as for contempt; and the court must issue a new order for the summoning of jurors, in substantially the same form; upon which the same proceedings must be had as upon the one first issued.

Id., § 14.

§ 710. **Jury, how constituted.** — When six jurors appear and are accepted, they constitute the jury.

Id., § 12.

See cases cited under § 706, *ante*.

§ 711. **Their oath.** — The court must thereupon administer to the jury the following oath or affirmation: "You do swear" [or you do solemnly affirm, as the case may be], "that you will well and truly try this issue, between the people of the state of New York and A. B., the defendant, and a true verdict give, according to the evidence."

8 R. S., 1007, § 15.

§ 712. **Trial, how conducted.** — After the jury are sworn, they must sit together and hear the proofs and allegations of the

parties, which must be delivered in public, and in the presence of the defendant.

Id., § 16.

§ 713. **Jury may decide in court, or retire; oath of officer on their retirement.** — After hearing the proofs and allegations, the jury may either decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court; that you will not permit any person to speak to or communicate with them, nor do so yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court."

Id., § 17.

§ 714. (Amended 1882.) **Delivering verdict, and entry thereof.** — When the jury have agreed on their verdict, they must deliver it publicly to the court, which must enter it in its minutes.

Id., § 18; *Powers v. People*, 4 Johns., 292; *Thomas v. People*, 19 Wend., 480.

§ 715. (Amended 1882.) **Discharge of jury without verdict.** — The jury cannot be discharged, after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for some cause within the meaning of sections four hundred and twenty-eight and four hundred and twenty-nine, the court sooner discharge them.

New.

If the jury cannot agree the court may discharge them and summon another. (*Vanderwerker v. People*, 5 Wend., 580; *Lattimore v. People*, 10 How., 836.)

§ 716. **In such cause, case to be retried.** — If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on until a verdict is rendered.

New. (*Vanderwerker v. People*, *supra*).

§ 717. **Judgment on conviction.** — When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment

or both, as the case may require; but the fine cannot exceed fifty dollars, nor the imprisonment six months.

3 R. S., 1007, § 19. Special sessions may commit upon conviction at any time while it retains jurisdiction. (*People v. Rawson*, 61 Barb., 619.)

(a) **Mittimus.**—A mittimus issued upon conviction need not set forth any fact not required by law to be stated in the record. (*People v. Moore*, 3 Park., 465.)

(b) **Contents of record of conviction.**—The record of the conviction in a court of special sessions, must show the jurisdiction of the justices. (*Powers v. People*, 4 Johns., 292; *Thomas v. People*, 19 Wend., 480.)

(c) **Pronouncing sentence.**—On a conviction in a special sessions, the sentence must be pronounced by the court as such; and the record must show that the court was then in session. (*Lattimore v. People*, 10 How., 836.)

§ 718. **Judgment of imprisonment until fine be paid; extent of imprisonment.**—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.

Laws 1876, ch. 61.

The mittimus need only state the offense, conviction and judgment thereon, without averring the jurisdictional facts. (*Ex parte Hogan*, 55 How., 458; *People v. Neilson*, 16 Hun, 214; see *Matter of Sweetman*, 1 Cow., 144.)

§ 719. **Defendant, on acquittal to be discharged; order that prosecutor pay the costs.**—When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings, or to give satisfactory security, by a written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial.

3 R. S., 1007, § 20.

§ 720. **Judgment against prosecutor for costs.**—If the prosecutor do not pay the costs or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced, in all respects, in the same manner as a judgment rendered by a justice's court held by a justice of the peace.

Id., § 21; see *Germond v. People*, 1 Hill, 348.

§ 721. (Amended 1882.) **Certificate of conviction; its form.**—When a conviction is had upon a plea of guilty, or upon a trial, the court must make and sign a certificate in substantially the following form :

“ Court of special sessions or *police court*.

"County of *Albany*, town of *Berne* [or as the case may be].

“ THE PEOPLE OF THE STATE OF NEW YORK
against
 A. B. }

January 1, 18 .

“The above-named A. B., having been brought before C. D., justice of special sessions, justice of the peace [or other magistrate, as the case may be], or police justice of the town [or city or village] of [as the case may be], charged with [briefly designating the offense].

"And having thereupon pleaded guilty or not guilty [or as the case may be], and demanded [or 'failed to demand,' as the case may be] a jury, and having been thereupon duly tried, and upon such trial duly convicted: It is adjudged that he be imprisoned in the jail of this county days [or 'pay a fine of dollars, and be imprisoned until it be paid, not exceeding days,' or both, as the case may be].

"Dated at the town [or 'city'] of _____, the _____ day
of _____, eighteen hundred and _____

“C. D.

“Justice of the peace or police justice or other magistrate [as the case may be] of the town [or ‘city’] of [as the case may be].”

8 R. S., 1012, § 50.

§ 722. **Certificate of conviction; its form.**—If the defendant have pleaded guilty, instead of the second paragraph, the certificate must state substantially as follows: "And the above-named A. B. having been thereupon duly convicted, upon a plea of guilty."

Id.

§ 723. Certificate, when filed.— Within twenty days after the conviction, the court must cause the certificate to be filed in the office of the clerk of the county.

8 R. S., 1012, § 51.

§ 724. **Certificate, conclusive evidence.** — The certificate, made and filed as prescribed in the last two sections, or a certified copy thereof, is conclusive evidence of the facts stated therein.

Id., § 53.

§ 725. **Judgment, by whom executed.** — The judgment must be executed by the sheriff of the county, or by a constable, marshal or policeman of the city, village or town in which the conviction is had, upon receiving a copy of the certificate prescribed in section seven hundred and twenty-one, certified by the court or the county clerk.

3 R. S., 1011, § 43.

(a) **Warrant must be directed to officer executing it.** — The warrant must point out the officer who is to execute it. (*Russell v. Hubbard*, 6 Barb., 654.)

§ 726. **Fine, by whom received before commitment, and how applied.** — If a fine imposed be paid before commitment, it must be received by the court, and be applied to the payment of the expenses of the prosecution. The residue, if any, must be paid by the court within thirty days after its receipt, into the county treasury.

3 R. S., 1011, § 44; Id., § 54.

§ 727. **Fine, to whom paid after commitment, and how applied.** — If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person; who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury.

Id., § 45.

§ 728. **Proceedings against magistrate or sheriff, on neglect to pay fine into county treasury.** — If the court or sheriff receiving the fine, fail to pay it, or such part of it as is so payable, into the county treasury, the county treasurer must immediately commence an action against the sheriff or the magistrates composing the court therefor in the name of the county.

Id., § 46.

§ 729. **Subpoenas for witnesses, and punishing them for disobedience.** — The court may issue subpoenas for witnesses, as

provided in section six hundred and eight, and punish disobedience thereof, as provided in section six hundred and nineteen.

Id., 47.

§ 730. **Punishing jurors for non-attendance.**—If a person summoned as a juror fail to appear, he may be punished by a fine not exceeding five dollars imposed by the court, by an order entered in his minutes. The order is deemed a judgment, in all respects, in favor of the poor of the town or city.

3 R. S., 1012, § 48.

§ 731. **No fees to jurors or witnesses.**—No fees are payable to a juror or witness, for his service or attendance in a court of special sessions.

Id., § 49.

§ 732. **When defendant requests a trial by police court, preliminary examination dispensed with.**—When the defendant, upon being brought before the magistrate, requests a trial by a court of special sessions, the preliminary examination of the case is dispensed with.

3 R. S., 1005, § 2.

§ 733. **During time allowed for bail, and until judgment, defendant to be continued in custody of officer or committed to jail.**—During the time allowed to the defendant to give bail, and until judgment is given, he may be continued in the custody of the officer, or committed to the jail of the county to answer the charge, as the magistrate may direct.

Id., § 5.

§ 734. **Form of commitment.**—The commitment must be signed by the magistrate, by his name of office, and must be in substantially the following form:

“The sheriff of the county of _____, is required to receive and detain A. B., who stands charged before me for [designating the offense, generally], to answer the charge before a court of special sessions in the town [or city] of _____ [as the case may be].

“Dated at the town [or city] of _____, the _____ day of _____, 18 _____.

“C. D., justice of the peace of the town [or city] of _____, [as the case may be].”

New.

§ 735. **By whom executed.**— When committed, the defendant must be delivered to the custody of the proper officer, by any peace officer in the county to whom the magistrate may deliver the commitment.

New.

§ 736. **Defendant may be admitted to bail.**— Either before or after his committal, or upon being committed, the defendant must, if he require it, be admitted to bail.

New.

§ 737. **Bail, how and by whom taken.**— The bail must be taken by the magistrate, by a written undertaking, executed by the defendant, with one or more sufficient sureties approved by the magistrate, in a sum not exceeding two hundred dollars.

New.

§ 738. (Amended 1882.) **Form of the undertaking.**— The undertaking must be in substantially the following form :

“ A. B., having been duly charged before C. D., a justice of the peace in the town [or city] of , [as the case may be] with the offense of [designating the offense generally]. We undertake jointly and severally that he shall appear thereon from time to time, until judgment, at a court of special sessions in the town, or village [or city] of , [as the case may be], competent to try the case, or that he will pay to the county of [naming the county in which the court is held] the sum of dollars [inserting the sum fixed by the magistrate].

“ Dated at the town [or city] of [as the case may be].”

New in form.

§ 739. **Undertaking, when forfeited, and action thereon.**— If the defendant fail to appear according to the undertaking, the court, unless a sufficient excuse be shown, must declare the undertaking of bail forfeited, and the county treasurer must immediately commence an action for the recovery of the sum mentioned therein, in the name of the county.

New.

§ 740. **Forfeiture, how and by whom remitted.**— The county court of the county, or in the city of New York, the court of common pleas of that city, may remit the forfeiture or

any part thereof, in the cases and in the manner provided in the Code of Civil Procedure.

3 R. S., 773, § 88; see Code Civ. Pro., §§ 850-853, 286, 294.

TITLE II.

OF THE PROCEEDINGS IN THE COURT OF SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

SECTION 741. Police courts in New York, to proceed as prescribed in last title, except as provided in next seven sections.

742. In what cases to proceed to trial.

743. If jury demanded, magistrate to proceed to examination of charge.

744. Trial to be before the court, without a jury.

745. Clerk to issue subpoena, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.

746. Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.

747. All other fines to be paid to sheriff; his account thereof, when and to whom rendered.

748. No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.

§ 741. Police courts in New York, to proceed as prescribed in last title, except as provided in next seven sections. — The court of special sessions, in the city and county of New York, must proceed upon a criminal charge in the manner prescribed in the last title, except as provided in the next seven sections, and by special statutes.

New.

§ 742. In what cases to proceed to trial. — When the court of special sessions in the city and county of New York has jurisdiction, it must proceed to the trial in the following cases:

1. When the defendant has requested to be tried in such court;
2. When (having omitted for twenty-four hours to give bail, as required by the magistrate before whom he was brought, for his appearance at the next court of general sessions of the city and county of New York) a jury is not demanded by him, on being brought before the court of special sessions for trial.

3 R. S., 1009, §§ 29, 30.

(a) **May try cases without a jury.** — The court of special sessions of New York has power to try cases without a jury, the defendant having

elected to be tried by the court. (*People v. The Justices of the Court of Special Sessions*, 13 Hun, 533; 74 N. Y., 406; *People v. Special Sessions of New York*, 4 Hun, 441.)

(b) **Prisoner must expressly waive jury.** — The special sessions cannot acquire jurisdiction to try a prisoner for a crime, unless he expressly waives the right to be tried by a jury. (*People v. Mallon*, 39 How., 454.)

(c) **Id.** — It will not do to ask him if he elects to be tried by this court by the question if he waives a trial by jury must be clearly put, and must appear on the minutes or record, otherwise the conviction is void. (*Id.*)

(d) **Effect of omitting to give bail.** — A court of special sessions can only acquire jurisdiction over the person of the accused, upon his request to be tried before it or his omission for the space of twenty-four hours to give bail for his appearance. (*People v. Berberich*, 20 Barb., 224; 11 How., 289; *Wynehamer v. People*, 13 N. Y., 378.)

§ 743. **If jury demanded, magistrate to proceed to examination of charge.** — If, in the case mentioned in the second subdivision of the last section, a jury be demanded, the court of special sessions must proceed to the examination of the charge, and hold the defendant to answer or discharge him, in same manner as the magistrate before whom he was originally brought might have done.

New.

§ 744. **Trial to be before court, without a jury.** — The trial must, in all cases, be before the court without a jury.

New.

(a) **Must be three justices.** — Three justices are necessary to constitute a court of special sessions in New York city. (Laws 1853, ch. 282.)

(b) **Conviction by two illegal.** — Hence a conviction and commitment by two only is void, as without jurisdiction. (*Devine's case*, 11 Abb., 90; 21 How., 80; 5 Park., 62.)

§ 745. **Clerk to issue subpoenas, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.** — Subpoenas for witnesses, and the certificate of the judgment, must be signed by the clerk of the court, who must also enter all the proceedings of the court, and the sentences upon convictions, in a book of minutes, and when necessary, certify the proceedings of the court.

3 R. S., 1010, § 38.

§ 746. **Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.** — Fines, imposed by the court, must be received by the clerk, if paid before com-

mittal in execution of the judgment. He must, every thirty days, render to the comptroller of the city, accounts of the fines imposed and received by him, and of the expenses attending the court.

Id., § 40.

§ 747. **All other fines to be paid to sheriff; his account thereof, when and to whom rendered.**— All fines, not paid to the clerk, as provided in the last section, must be received by the sheriff of the city and county of New York; who must, within thirty days thereafter, pay them to the comptroller of the city, in the same manner as he is required to pay fines imposed by the court of general sessions of the city and county of New York, and received by him.

Id.

§ 748. **No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.**— No transcript of a conviction, had in a court of special sessions in the city and county of New York, need be certified or filed; but a copy of the minutes of the conviction, certified by the clerk, is conclusive evidence of the facts contained therein.

Id., § 41; *Laws 1830, ch. 42, § 7.*

TITLE III.

OF APPEALS FROM COURTS OF SPECIAL SESSIONS.

SECTION 749. Judgment of special sessions, reviewable only upon appeal.

750. Appeal, for what causes allowed.

751. Appeal, how taken.

752. How allowed.

753. Discharge of defendant from custody, upon undertaking.

754. Undertaking, when and with whom filed.

755. Delivery of affidavit, and allowance of appeal, to magistrate or clerk of police court, within five days after allowance.

756. Return, when and how made.

757. Compelling return.

758. Ordering and compelling further or amended return.

759. Appeal, by whom and how brought to argument.

760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown.

SECTION 761. Service of return on district attorney, and consequences of failure.

762. If brought to hearing by defendant, appeal must be argued, though no one oppose, etc.

763. Appeal to be heard on original return.

764. What judgment may be rendered.

765. Judgment to be entered on the minutes.

766. Order upon judgment for affirmance.

767. Order upon judgment of reversal.

768. If new trial ordered, to be had in court of sessions; proceedings thereon.

769. Proceedings to carry judgment upon appeal into effect, to be had in court of sessions.

770. On judgment of court of sessions, defendant may appeal to supreme court; his admission to bail.

771. Judgment of supreme court upon appeal, final.

772. Proceedings to carry into effect judgment of supreme court.

§ 749. Judgment of special sessions reviewable only upon appeal.— A judgment upon conviction, rendered by a court of special sessions, may be reviewed by the court of sessions of the county, upon an appeal, as prescribed by this title, and not otherwise.

New.

§ 750. (Amended 1882.) Appeal, for what causes allowed.— An appeal may be allowed for an erroneous decision or determination of law or fact upon the trial.

3 R. S., 1013, § 58.

(a) **Exceptions to evidence.**— Exceptions to evidence will not lie in a court of special sessions. (*Ex parte Boswell*, 34 How., 347.)

§ 751. Appeal, how taken.— For the purpose of appealing, the defendant, or some one on his behalf, must, within ten days after the judgment, make an affidavit, stating the fact showing the alleged errors in the proceedings or conviction complained of, and must, within that time, present it to the county judge or a judge of the supreme court, or in the city and county of New York to the recorder or city judge, or judge of general sessions of that city, and may apply thereon for the allowance of the appeal.

Id., § 57.

§ 752. How allowed.— If, in the opinion of the judge, it is proper that the question arising on the appeal should be decided

by the court of sessions, he must indorse on the affidavit an allowance of the appeal to that court.

Id., § 58.

§ 753. Discharge of defendant from custody, upon undertaking. — Upon allowing the appeal, the judge may take from the defendant a written undertaking, with such sureties as he may approve, that the defendant will abide the judgment of the court of sessions upon the appeal; and may thereupon order that he be discharged from imprisonment, on service of the order upon the officer having him in custody, or if he be not in custody, that all proceedings on the judgment be stayed.

Id., §§ 64, 65.

§ 754. Undertaking, when and with whom filed. — The undertaking upon the appeal must be immediately filed with the clerk of the court of sessions.

Id., § 66.

§ 755. Delivery of affidavit, and allowance of appeal, to magistrate or clerk of police court, within five days after allowance. — The affidavit and allowance of the appeal must be delivered to the magistrate who tried the action, or, if in the city and county of New York, to the clerk of the court of special sessions, within five days after the allowance of the appeal; and when so delivered, the appeal is deemed taken.

Id., § 59.

§ 756. Return, when and how made. — The magistrate or court rendering the judgment, must make a return to all the matters stated in the affidavit, and must cause the affidavit and return to be filed in the office of the clerk of the court of sessions, within ten days after the service of the affidavit and allowance of the appeal.

Id., § 60.

§ 757. Compelling return. — If the return be not made within the time prescribed in the last section, the court of sessions, or the presiding judge thereof, may order that a return be made within a specified time which may be deemed reasonable; and the court may, by attachment, compel a compliance with the order.

Id., § 61.

§ 758. Ordering and compelling further or amended return. — If the return be defective, a further or amended return may be ordered, and the order may be enforced in the manner provided in the last section.

Id., § 61.

§ 759. Appeal, by whom and how brought to argument. When the return is made, the appeal may be brought to argument by the defendant, on any day in term, upon a notice of not less than five days before the term, to the district attorney of the county.

Id., §§ 62, 78.

§ 760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown. If the defendant omit to bring the appeal to argument, as provided in the last section, the court must dismiss it, unless it continue the same, by special order, for cause shown.

Id., § 71.

§ 761. Service of return on district attorney, and consequences of failure. — The defendant must serve upon the district attorney, a copy of the return, with or before the notice of argument. If he fail to do so, the appeal must be dismissed, upon proof of the failure, unless the court otherwise direct.

Id., § 78.

§ 762. If brought to hearing by defendant, appeal must be argued, though no one oppose, etc. — If the appeal be brought to hearing by the defendant, it must be argued, though no one appear to oppose; but if brought on by the district attorney, he may take judgment of affirmance, unless the defendant appear to argue the appeal.

See Rule 21, Ct. Appeals.

§ 763. Appeal to be heard on original return. — The appeal must be heard upon the original return; and no copy thereof need be furnished for the use of the court.

New.

§ 764. (Amended 1882.) What judgment may be rendered. After hearing the appeal the court must give judgment without

regard to technical errors or defects which have not prejudiced the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence.

New.

§ 765. **Judgment to be entered on the minutes.**— When judgment is given upon the appeal, it must be entered upon the minutes.

New.

§ 766. **Order upon judgment for affirmance.**— If the judgment be affirmed, the court must direct its execution, and if the defendant be discharged on bail, after the commencement of the execution of a judgment of imprisonment, must commit him to the proper custody for the remainder of his term of imprisonment.

3 R. S., 1013, §§ 69, 70.

§ 767. **Order upon judgment of reversal.**— If the judgment be reversed, and the defendant be imprisoned in pursuance of the judgment of the police court, the court of sessions must order him to be discharged.

3 R. S., 1014, §§ 68, 69.

§ 768. **If new trial ordered, to be had in court of sessions; proceedings thereon.**— If a new trial be ordered, it must be had in the court of sessions, in the same manner as upon an issue of fact on an indictment; and that court may proceed to judgment and execution, as in an action prosecuted by indictment.

New.

§ 769. **Proceedings to carry judgment upon appeal into effect, to be had in court of sessions.**— If any proceedings be necessary to carry the judgment upon the appeal into effect, they must be had in the court of sessions.

Id., § 68.

§ 770. **On judgment of court of sessions, defendant may appeal to supreme court; his admission to bail.**— If the

judgment on the appeal be against the defendant, he may appeal therefrom to the supreme court, in the same manner as from a judgment in an action prosecuted by indictment, and may be admitted to bail upon the appeal, in like manner.

New.

§ 771. Judgment of supreme court upon appeal, final.
The judgment of the supreme court upon the appeal is final.

New.

§ 772. Proceedings to carry into effect judgment of supreme court.—The same proceedings must be had, to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken upon a judgment in an action prosecuted by indictment.

New.

PART VI.

OF SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

- TITLE**
- I. OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.
 - II. OF SEARCH WARRANTS.
 - III. OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.
 - IV. OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.
 - V. OF PROCEEDINGS RESPECTING BASTARDS.
 - VI. OF PROCEEDINGS RESPECTING VAGRANTS.
 - VII. OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.
 - VIII. OF PROCEEDINGS RESPECTING THE SUPPORT OF POOR PERSONS.
 - IX. OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES AND SERVANTS.
 - X. OF CRIMINAL STATISTICS.
 - XI. MISCELLANEOUS PROVISIONS RESPECTING PROCEEDINGS OF A CRIMINAL NATURE.

TITLE I.

OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.

- SECTION 773.** In what cases coroner to summon a jury; number of jurors to be summoned.
774. Jury to be sworn.
775. Witnesses to be subpoenaed.
776. Compelling attendance of witnesses, and punishing their disobedience.
777. Verdict of the jury.
778. Testimony, how taken and filed.
779. If defendant arrested before inquisition filed, depositions to be delivered to magistrate, and by him returned.
780. Warrant for arrest of party charged by verdict.
781. Form of warrant.
782. Warrant, how executed.
783. Proceedings of magistrate, on defendants being brought before him.
784. Clerk with whom inquisition is filed, to furnish magistrate with copy of the same and of testimony returned therewith.
785. Coroner to deliver money or property found, on deceased, to county treasurer.

SECTION 786. County treasurer to place money to credit of county; and to sell other property and place proceeds to credit of county.

787. Money, when and how paid to representatives of deceased.

788. Supervisors to require statement under oath, from coroner, before auditing his accounts.

789. In New York, police justices may perform duties of coroner, during his inability.

790. Compensation of coroners.

§ 773. In what cases coroner to summon a jury ; number of jurors to be summoned. — When a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another, by criminal means, or has committed suicide, he must go to the place where the person is, and forthwith summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at a specified place, to inquire into the cause of the death or wound.

3 R. S., 1039, § 1; Laws 1847, ch. 118.

§ 774. Jury to be sworn. — When six or more of the jurors appear, they must be sworn by the coroner to inquire who the person was, and when, where and by what means he came to his death or was wounded, as the case may be, and into the circumstances attending the death or wounding, and to render a true verdict thereon, according to the evidence offered to them, or arising from the inspection of the body.

Id., § 5.

§ 775. Witnesses to be subpoenaed. — The coroner may issue subpoenas for witnesses, returnable forthwith, or at such time and place as he may appoint. He must summon and examine as witnesses, every person who, in his opinion, or that of any of the jury, has any knowledge of the facts; and he must summon as a witness a surgeon or physician, who must, in the presence of the jury, inspect the body, and give a professional opinion as to the cause of the death or wounding.

Id., § 6; Laws 1873, ch. 883.

(a) **Prisoner cannot cross-examine.** — The prisoner has no right to cross-examine witnesses before the coroner, or to produce witnesses in his own behalf. (*People v. Collins*, 20 How., 111; 11 Abb., 406.)

(b) **May issue process.** — The Revised Statutes giving coroners the same powers of justices of the peace to issue process and examine the accused in certain cases, confers simply the powers of justices generally throughout the state and not of the particular locality, when the coroner is called on to act. (*People v. Beigler*, 8 Park., 816.)

(c) **Buffalo police justice.** — The jurisdiction conferred upon the police justice of the city of Buffalo by the act of 1853, did not interfere with the powers of the coroner of the county. (*Id.*)

(d) **Who may be present at post mortem.** — When a coroner directs a post mortem examination to be made, he may, in his discretion, determine whether any and what persons shall be present besides the surgeons. (*Orisfield v. Perrine*, 15 Hun, 200.)

(e) **Party suspected may not be present.** — And it seems that one suspected of the murder of the person to be examined, has no right to be present; he loses no legal right by being excluded. (*Id.*)

(f) **Expense of chemical analysis.** — The coroner of New York had no power under the acts of 1868 and 1871, to bind the city to the expense of a chemical analysis of the remains of a deceased person to ascertain the cause of death. (*Doremus v. New York*, 6 Daly, 121.)

This power has been since conferred by the act of 1875, chapter 620.

(g) **Coroner personally liable.** — The coroner is personally liable to a physician employed by him to examine a body at an inquest, and must charge the same in his account against the county. (*Van Hoesenburgh v. Hasbrouck*, 45 Barb., 197.)

§ 776. **Compelling attendance of witnesses, and punishing their disobedience.** — A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, as upon a subpoena issued by a magistrate, as provided in this Code.

§ R. S., 1039, § 7; see, also, Code Civ. Proc., §§ 8-13, 853-863.

§ 777. **Verdict of the jury.** — After inspecting the body and hearing the testimony, the jury must render their verdict, and certify it by an inquisition in writing, signed by them, and setting forth who the person killed or wounded is, and when, where and by what means he came to his death or was wounded; and if he were killed or wounded, or his death were occasioned by the act of another, by criminal means, who is guilty thereof, in so far as by such inquisition they have been able to ascertain.

Id., § 8.

(a) **Second Inquest.** — A coroner has no power to hold a second inquest "*super visum corporis*," unless the first has been vacated or set aside or is absolutely void. (*People v. Budge*, 4 Park., 519.)

§ 778. **Testimony, how taken and filed.** — The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and must be forthwith filed by him, with the inquisition, in the office of the clerk of the court of sessions of the county, or of a city court having power to inquire into the offense by the intervention of a grand jury.

Id., § 11.

(a) **What is a sufficient return.** — An unsigned memorandum of evidence on the back of the inquest returned, is not sufficient. (*People v. White*, 24 Wend., 520, 532.)

§ 779. **If defendant arrested before inquisition filed, depositions to be delivered to magistrate, and by him returned.** — If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it with the testimony to the magistrate before whom the defendant is brought, as provided in section seven hundred and eighty-one, who must return it with the depositions and statement taken before him, in the manner prescribed in section two hundred and twenty-one.

New.

§ 780. **Warrant for arrest of party charged by verdict.** If the jury find that the person was killed or wounded by another, under circumstances not excusable or justifiable by law or that his death was occasioned by the act of another, by criminal means, and the party committing the act be ascertained by the inquisition, and be not in custody, the coroner must issue a warrant, signed by him with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged.

Id., § 9.

§ 781. (Amended 1882.) **Form of warrant.** — The coroner's warrant must be in substantially the following form :

"County of Albany [or as the case may be].

"In the name of the people of the state of New York,

"To any peace officer in this state :

"An inquisition having been this day found by a coroner's jury, before me, stating that A. B. has come to his death by the

act of C. D. by criminal means [or as the case may be, as found by the inquisition].

"You are therefore commanded forthwith to arrest the above-named C. D. and take him before the nearest or most accessible magistrate in this county.

"Dated at the city of Albany [or as the case may be] the day of , eighteen hundred and

"E. F.,

"Coroner of the County of Albany.

"[Or as the case may be]."

New in form.

§ 782. **Warrant, how executed.** — The coroner's warrant may be served in any county; and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information, except that when served in another county it need not be indorsed by a magistrate of that county.

New.

(a) **May call in power of county.** — In a proper case the coroner may call to his aid the power of the county. (*Slater v. Wood*, 9 Bos., 15.)

§ 783. **Proceedings of magistrate on defendant's being brought before him.** — The magistrate, when the defendant is brought before him, must proceed to examine the charge contained in the inquisition, and hold the defendant to answer, or discharge him therefrom in the same manner, in all respects, as upon a warrant of arrest on an information.

New.

§ 784. **Clerk with whom inquisition is filed to furnish magistrate with copy of the same and of testimony returned therewith.** — Upon the arrest of the defendant, the clerk with whom the inquisition is filed must, without delay, furnish to the magistrate a certified copy of it, and of the testimony returned therewith.

New.

§ 785. **Coroner to deliver money or property found on deceased to county treasurer.** — The coroner must, within thirty days after an inquest upon a dead body, deliver to the county treasurer any money or other property which may be found upon the body, unless claimed in the meantime by the

legal representatives of the deceased. If he fail to do so, the treasurer may proceed against him for its recovery, by a civil action in the name of the county.

8 R. S., 1041, § 13; Laws 1842, ch. 155; Laws 1867, ch. 956, § 14.

§ 786. County treasurer to place money to credit of county, and to sell other property and place proceeds to credit of county.—Upon the delivery of money to the treasurer he must place it to the credit of the county. If it be other property, he must, within thirty days, sell it at public auction, upon reasonable public notice; and must, in like manner, place the proceeds to the credit of the county.

Id., § 14.

§ 787. Money, when and how paid to representatives of deceased.—If the money in the treasury be demanded within six years, by the legal representatives of the deceased, the treasurer must pay it to them, after deducting the fees and expenses of the coroner and of the county, in relation to the matter, or it may be so paid at any time thereafter, upon the order of the board of supervisors.

Id.

§ 788. Supervisors to require statement under oath from coroner, before auditing his accounts.—Before auditing and allowing the account of the coroner, the board of supervisors must require from him a statement in writing, of any money or other property found upon persons on whom inquests have been held by him, verified by his oath, to the effect that the statement is true, and that the money or property mentioned in it has been delivered to the legal representatives of the deceased, or to the county treasurer.

Id., § 15.

§ 789. In New York, police justices may perform duties of coroner, during his inability.—In the city of New York, if the coroner be absent, or be unable for any cause to attend, the duties imposed by this title may be performed by a police justice, but by no other officer, with the same authority, and subject to the same obligations and penalties as apply to the coroner.

* *Id.* S., 1041, § 12; see, also, Laws 1864, ch. 879.

§ 790. **Compensation of coroners.** — The coroner is entitled, for his services in holding inquests and performing any other duty incidental thereto, to such compensation as defined by special statutes.

Id., 1041, § 16.

TITLE II.

OF SEARCH WARRANTS.

SECTION 791. Search warrant defined.

792. Upon what grounds it may be issued.

793. It cannot be issued but upon probable cause, supported by affidavit.

794. Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.

795. Depositions, what to contain.

796. Magistrate, when to issue warrant.

797. Form of the warrant.

798. By whom served.

799. Officer may break open door or window to execute warrant.

800. May break open door or window to liberate person acting in his aid, or for his own liberation.

801. When warrant may be served in the night-time, and direction therefor.

802. Within what time warrant must be executed and returned.

803. Officer to give receipt for property taken.

804. Property, when delivered to magistrate; how disposed of.

805. Return of warrant, and delivery to magistrate of inventory of property taken.

806. Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to applicant for warrant.

807. If grounds for warrant controverted, magistrate to take testimony.

808. Testimony, how taken and authenticated.

809. Property, when to be restored to person from whom it was taken.

810. Depositions, search warrant, return and inventory, to be returned to court of sessions or city court having jurisdiction of offense.

811. Maliciously and without probable cause procuring search warrant, a misdemeanor.

812. Peace officer, exceeding his authority.

813. Person charged with felony supposed to have a dangerous weapon.

§ 791. **Search warrant defined.** — A search warrant is an order in writing, in the name of the people, signed by a magis-

trate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

New.

§ 792. Upon what grounds it may be issued. — It may be issued upon either of the following grounds :

1. When the property was stolen or embezzled ; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be ;

2. When it was used as the means of committing a felony ; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the crime, or of any other person in whose possession it may be ;

3. When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered ; in which case it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

. 8 R. S., 1045, § 46.

(a) **What constitutes a valid process ; grounds thereof.** — A search warrant issued upon information upon oath that certain goods had been stolen by A. and were concealed in the house of B., commanding the constable to enter the said house in the day-time and search for the goods stolen and bring them with B. or the person in whose custody the goods should be found, before the justice, is a valid process. (*Bell v. Clapp*, 10 Johns., 263.)

(b) **In cases of felony.** — Of the necessity of search warrants in cases of felony. (*City Bank v. Bangs*, 2 Edw., 95.)

§ 793. It cannot be issued but upon probable cause, supported by affidavit. — A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

U. S. Const. Amendment, 4.

§ 794. **Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.**—The magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

New.

See *Bell v. Clapp*, 10 Johns., 263.

§ 795. **Depositions, what to contain.**—The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

New.

§ 796. **Magistrate, when to issue warrant.**—If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

8 R. S., 1045, § 47.

§ 797. (Amended 1882.) **Form of the warrant.**—The warrant must be in substantially the following form:

“County of *Albany* [or as the case may be].

“In the name of the people of the state of New York:

“To any peace officer in the county of *Albany* [or as the case may be]: Proof by affidavit having been this day made before me, by [naming every person whose affidavit has been taken], that [stating the particular grounds of the application, according to section seven hundred and ninety-two, or if the affidavit be not ‘positive that there is probable cause for believing that,’ stating the ground of the application in the same manner].

“You are therefore commanded in the day-time [or ‘at any time of the day or night,’ as the case may be, according to section eight hundred and one], to make immediate search on the person of C. D. [or ‘in the building situated,’ describing it, or any other place to be searched, with reasonable particularity as the case may be], for the following property [describing it with reasonable

particularity]: and if you find the same, or any part thereof, to bring it forthwith before me at [stating the place].

Dated at the city of *Albany* [or as the case may be], the day of _____, eighteen hundred _____.

“ E. F.,

“ Justice of the peace of the city [or town],
of [or as the case may be].”

New in form.

Requisites of a valid search warrant. (*Johnson v. Comstock*, 14 Hun, 238.)

(a) **Under seal.**—A search warrant must be under seal; it must be directed to the proper officer and must particularly designate the place to be searched, or it is no protection to the officer. (*People v. Holcomb*, 8 Park., 656; *Bell v. Clapp*, 10 Johns., 263; *Smith v. Randall*, 3 Hill, 495.)

(b) **Protection thereof.**—A search warrant legally and regularly issued and duly executed in the day-time, is a protection as well to the party on whose oath it is issued, as to the officer who executed it. (*Beatty v. Perkins*, 6 Wend., 382.)

§ 798. **By whom served.**—A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution.

Id., § 49.

See *Bell v. Clapp*, 10 Johns., 263.

§ 799. **Officer may break open door or window, to execute warrant.**—The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

New.

(a) **Officer may break in.**—The officer, in the execution of a search warrant, after a demand and refusal to open the outer or other door of the house, may break it open. (*Bell v. Clapp*, 10 Johns., 263.)

§ 800. **May break open door or window to liberate person acting in his aid, or for his own liberation.**—He may break open any outer or inner door or window of a building for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

New. (See *Bell v. Clapp*, *supra*.)

§ 801. When warrant may be served in the night-time, and direction therefor.—The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits be positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night.

Id., § 48.

§ 802. Within what time warrant must be executed and returned.—A search warrant must be executed, and returned to the magistrate by whom it was issued, if issued in the city and county of New York, within five days after its date, and if in any other county, within ten days. After the expiration of those times respectively, the warrant, unless executed, is void.

New.

§ 803. Officer to give receipt for property taken.—When the officer takes property under the warrant, he must give a receipt for the property taken [specifying it in detail], to the person from whom it was taken by him, or in whose possession it was found, or, in the absence of any person, he must leave it in the place where he found the property.

New.

§ 804. Property, when delivered to magistrate how disposed of.—When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections six hundred and eighty-seven to six hundred and eighty-nine, both inclusive. If it were taken on a warrant issued on the grounds stated in the second and third subdivisions of section seven hundred and ninety-two, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense, in respect to which the property was taken, is triable.

New.

§ 805. Return of warrant, and delivery to magistrate of inventory of property taken.—The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the

affidavit of the officer, and taken before the magistrate, to the following effect: "I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

New.

§ 806. **Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to applicant for warrant.** — The magistrate must thereupon if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

New.

§ 807. **If grounds for warrant controverted, magistrate to take testimony.** — If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

New.

§ 808. **Testimony, how taken and authenticated.** — The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section two hundred.

New.

§ 809. **Property, when to be restored to person from whom it was taken.** — If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

New.

§ 810. **Depositions, search warrant, return and inventory, to be returned to court of sessions or city court having jurisdiction of offense.** — The magistrate must annex together the depositions, the search warrant and return, and the inventory, and return them to the next court of sessions of the county or city court, having power to inquire into the offense in respect to which the search warrant was issued, by the intervention of a grand jury, at or before its opening on the first day.

New.

§ 811. **Maliciously and without probable cause procuring search warrant, a misdemeanor.** — A person who maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

New.

§ 812. **Peace officer, exceeding his authority.** — A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

New. (Penal Code, § 120.)

§ 813. **Person charged with felony supposed to have a dangerous weapon, etc.** — When a person charged with felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon, or any thing which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order or the order of the court in which the defendant may be tried.

New.

TITLE III.

OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.

SECTION 814. When application for outlawry may be made.

815. On what proof to be made.

816. Order that the defendant appear to receive judgment, or be outlawed.

817. Publication of order.

818. Judgment on appearance of defendant, or on his not appearing.

819. Effect of the judgment.

820. Filing judgment roll, and transcripts thereof.

821. Judgment roll, of what to consist.

822. Appeal may be at any time taken, by defendant, from judgment.

823. Appeal, how taken, and proceedings thereon.

824. Effect of reversal.

825. Defendant may be arrested to receive judgment, notwithstanding outlawry.

826. No other proceeding for outlawry in criminal cases allowed.

§ 814. **When application for outlawry may be made.** — When, upon a bench warrant issued for the apprehension of a

person who has pleaded guilty, or against whom a verdict has been rendered upon an indictment for treason, it is duly returned that the defendant cannot be found, the district attorney of the county may apply to the court in which the conviction was had, for judgment of outlawry.

8 R. S., 1043, §§ 28, 29.

§ 815. On what proof to be made.— The application must be founded upon the return of the bench warrant, and upon proof, by affidavit, that the defendant has escaped, and on diligent search cannot be found within the county.

Id., § 29.

§ 816. Order that the defendant appear to receive judgment, or be outlawed.— The court, upon being satisfied that the defendant has escaped, and cannot, upon diligent search, be found in the county, must make an order that he appear on the first day of the next term, to receive judgment upon the conviction or be outlawed.

Id., § 30.

§ 817. Publication of order.— The order must be immediately published, once a week for six successive weeks, in a newspaper published in the county, and in the state paper. The expense of the publication is a county charge.

Id., § 31.

§ 818. Judgment on appearance of defendant, or on his not appearing.— If the defendant appear, judgment must be rendered against him upon the conviction. If he do not appear, the court, upon proof of the due publication of the order, must render judgment that the defendant be outlawed, and that all his civil rights be forfeited.

Id., §§ 32, 33.

§ 819. Effect of the judgment.— The defendant is thereupon deemed civilly dead, and forfeits to the people of this state, during his life-time, and no longer, all freehold estate in real property, of which he was seized in his own right, at the time of committing the treason, or at any time thereafter, and all his personal property.

Id., § 34; see Penal Code, § 710.

§ 820. Filing judgment roll, and transcripts thereof. — Upon a judgment of outlawry, the judgment roll must be made up, and filed with the clerk of the county in which the conviction was had, and docketed with the same effect as in a civil action. A transcript thereof may also be filed and docketed, with the like effect, in any other county.

Id., § 35.

§ 821. Judgment roll, of what to consist. — The judgment roll consists of the several matters prescribed in section four hundred and eighty-five, except the fifth subdivision; to which must be annexed a certified copy of the order to appear for judgment, the affidavits proving its publication, and a certified copy of the judgment of outlawry.

New.

§ 822. Appeal may be at any time taken by defendant from judgment. — An appeal may be taken by the defendant, at any time, from a judgment of outlawry.

Id., § 36.

§ 823. Appeal, how taken, and proceedings thereon. — The appeal may be taken in person or by counsel, in the same manner, and the proceedings thereon are the same as upon an appeal from a judgment of conviction on an indictment.

New.

§ 824. Effect of reversal. — If the judgment be reversed on appeal, the defendant is restored to his civil rights.

Id., § 36.

§ 825. Defendant may be arrested to receive judgment, notwithstanding outlawry. — Notwithstanding judgment of outlawry against the defendant, he may be arrested at any time thereafter to receive judgment upon the conviction.

Id., § 37.

§ 826. No other proceeding for outlawry in criminal cases allowed. — No other proceeding for the outlawry of the defendant in a criminal action can be had than that provided in this title.

Id., § 38.

TITLE IV.

OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

- CHAPTER I. Fugitives from another state or territory, into this state.
II. Fugitives from this state, into another state or territory.

CHAPTER I.

FUGITIVES FROM ANOTHER STATE OR TERRITORY INTO THIS STATE.

- SECTION 827. To be delivered up by the governor, on demand of the executive authority of the state or territory from which they have fled.
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835. Magistrate to return his proceedings to the next court of sessions; proceedings thereon.

§ 827. To be delivered up by the governor, on demand of the executive authority of the state or territory from which they have fled.—A person charged in any state or territory of the United States, with treason, felony, or other crime, who shall flee from justice and be found in this state, must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the governor of this state, to be removed to the state or territory having jurisdiction of the crime.

U. S. Const., art. IV, § 2.

(a) **Prevalence of the usage.**—It is the law and usage of nations to deliver up fugitives from justice, charged with felony and other high crimes, who have fled into a friendly jurisdiction, and it is the duty of a civil magistrate to commit such a one in order to his surrender. (*Ex parte Washburn*, 4 Johns. Ch., 106; 3 Wh. Cr. Cas., 473.)

(b) **Conditions of obtaining requisition.**—To authorize the surrender of a fugitive from justice, there must be a demand by the executive of the state from which he fled, and a copy of the affidavit or indictment charging

the offense must be produced, certified by such executive as authentic. (*Ex parte Solomans*, 1 Abb. [N. S.], 347.)

(c) **Effect of requisition.**—A requisition from the governor of another state upon the executive of this state is no warrant for the arrest of an alleged fugitive from justice. In the absence of other authority a prisoner so held will be discharged on *habeas corpus*. (*Ex parte Rutter*, 7 Abb. [N. S.], 67.)

(d) **Fugitive from justice must be demanded promptly.**—An alleged fugitive from justice if not demanded in a reasonable time by the executive of the state from which he fled, will be discharged from arrest. (*People v. Goodhue*, 2 Johns. Ch., 198; 1 Wh. Cr. Cas., 427; *Ex parte Washburn*, 4 Johns. Ch., 106.)

(e) **One guilty of fraud.**—Under what circumstances a person guilty of fraud will be surrendered. (*Ex parte Adams*, 7 Law Rep., 386.)

§ 828. **Magistrate to issue warrant.**—A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found within this state.

3 R. S., 1003, § 41.

(f) **Proof that party is a fugitive.**—Where a crime has been committed in another state, and the party is found in this state, this establishes conclusively that he is a fugitive from justice; the governor has no right to inquire into the truth of the charge, nor to look outside the papers to determine whether or not the person is a fugitive; and on *habeas corpus* the court cannot go behind the warrant. (*People v. Pinkerton*, 17 Hun, 199.)

(g) **Party held for a crime in this state.**—A party in arrest on a civil process cannot be surrendered on the governor's warrant as a fugitive from justice until he has satisfied the justice of the state in which he is held. (*Ex parte Briscoe*, 51 How., 422.)

§ 829. **Proceedings for arrest and commitment of the person charged.**—The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this Code, for the arrest and commitment of a person charged with a public offense committed in this state; except, that an exemplified copy of an indictment found, or other judicial proceedings had against him, in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

Id., § 42.

(a) **Contents of affidavit.**—The affidavit for the arrest of a fugitive from justice must state positively that the crime was committed within the state from which he fled; and that he is actually a fugitive from that state. (*Ex parte Heyward*, 1 Sandf., 701; 1 Code Rep., 45; *Ex parte Leland*, 7 Abb. [N. S.], 64; *People v. Brady*, 56 N. Y., 182.)

(b) **Regularity of proceedings.**—Where a fugitive from justice is brought up on *habeas corpus*, the court will not inquire into his probable guilt,

but only as to the legality of the process and the regularity of the commitment. (*Ex parte Clark*, 9 Wend., 212; *People v. Brady*, 56 N. Y., 182; *People v. Pinkerton*, 1 i Hun, 199.)

(c) **Proof required.** — When the demand for the surrender of a fugitive from justice is supported by affidavit, no less degree of certainty is admissible than is required in an indictment for the same offense. (*People v. Brady*, 56 N. Y., 182.)

(d) **Crime of forgery.** — An affidavit stating that the prisoner is charged with the crime of forgery in another state, is not sufficient for his detention. (*Ex parte Leland*, 7 Abb. [N. S.], 64; see *Ex parte Salomans*, 1 Abb. [N. S.], 347.)

§ 830. **When and for what time to be committed.** — If, from the examination, it appear that the person charged has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for a time specified in the warrant, which the magistrate deems reasonable, to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

Id., § 43.

(a) **Must be demanded promptly.** — An alleged fugitive from justice if not demanded in a reasonable time by the executive of the state from which he fled, will be discharged from arrest. (*People v. Goodhue*, 2 Johns. Ch., 198; 1 Wh. Cr. Cas., 427; *Ex parte Washburn*, 4 Johns. Ch., 106.)

(b) **What evidence sufficient.** — The evidence to detain a fugitive for the purpose of surrender, must be such as would be sufficient to commit him for trial had the crime been perpetrated in the state to which he fled. (*Ex parte Washburn*, 4 Johns. Ch., 106; 8 Wh. C. C., 478.)

§ 831. **His admission to bail.** — A judge of the supreme court may admit the person arrested, to bail, by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the governor of this state.

Id., § 44.

§ 832. **Magistrate to give notice to the district attorney of the name of the person and the cause of his arrest.** — Immediately upon the arrest of the person charged, the magis-

trate must give notice to the district attorney of the county, of the name of the person and the cause of his arrest.

Id., § 45.

§ 833. District attorney to give notice to executive authority of the state or territory, etc. — The district attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

Id., § 45.

§ 834. Person arrested to be discharged, unless surrendered within the time limited. — The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the governor of this state.

Id., § 46.

§ 835. Magistrate to return his proceedings to the next court of sessions; proceedings thereon. — The magistrate must return his proceedings to the next court of sessions of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged; and if he be in custody, or the time for his arrest have not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or continue his detention for a longer time or readmit him to bail, to appear and surrender himself within a time specified in the undertaking.

Id., § 47.

CHAPTER II.

FUGITIVES FROM THIS STATE, INTO ANOTHER STATE OR TERRITORY.

SECTION 836. Accounts of persons employed in procuring the surrender of fugitives from this state, how paid.

837. No public officer of this state to receive compensation for procuring demand or surrender of fugitive, etc.

Sections 836 and 837, repealed in 1882.

TITLE V.

OF PROCEEDINGS RESPECTING BASTARDY.

- CHAPTER I. Proceedings before magistrates, respecting bastards.
II. Appeals from the orders of magistrates, respecting bastards.
III. Enforcement of the undertaking for the support of the bastard or its mother, or for appearance on appeal.

CHAPTER I.

PROCEEDINGS BEFORE MAGISTRATE RESPECTING BASTARDS.

- SECTION 838. Definition of a bastard.
839. Who are liable for its support.
840. When bastard, chargeable to the public, is born or is likely to be born, application to be made to a justice of the peace or police justice.
841. Examination by the magistrate, and warrant against the father.
842. Justice designated as a magistrate, and person proceeded against as defendant.
843. Warrant, when to be served in another county.
844. Magistrate in another county may take undertaking for support of bastard and mother, or for appearance of defendant at the sessions.
845. On giving undertaking, defendant to be discharged.
846. If undertaking not given, defendant to be taken before magistrate who issued the warrant.
847. Before what magistrate in the same county defendant is to be taken, when the magistrate issuing the warrant is unable to act.
848. The magistrate to associate with himself another magistrate, and they to examine the matter.
849. Adjournment of examination; security from defendant.
850. Determination of the case, and order of the magistrates.
851. Defendant to pay the costs, and give undertaking for support of bastard and mother, or for appearance at sessions.
852. On giving undertaking, defendant to be discharged, otherwise, to be committed.
853. Commitment of defendant during examination.
854. Proceedings by magistrate, when security is given by defendant on arrest out of the county.
855. Examination in such case, and order thereon.
856. Magistrates may compel mother to disclose the father of the bastard; proceedings, if she refuse.
857. If mother possess property, two magistrates may make an order that she pay for the support of the child.

SECTION 858. If she do not comply, she must be committed, or discharged on undertaking.

859. Magistrates may reduce amount directed to be paid by the father or mother; court of sessions may reduce or increase it.

860. Proceedings against the father or mother absconding from their place of residence.

§ 838. Definition of a bastard. — A bastard is a child who is begotten and born,

1. Out of lawful matrimony;

2. While the husband of its mother was separate from her for a whole year previous to its birth; or,

2. During the separation of its mother from her husband pursuant to a judgment of a competent court.

3 R. S., 898, § 1.

§ 839. Who are liable for its support. — The father and mother of a bastard are liable for its support. In case of their neglect or inability, it must be supported by the county, city or town in which it is born, as provided by special statutes.

Id., § 2.

(a) **Mother may control bastard child.** — The mother of a bastard child has the right to its control and custody as against the putative father, and is bound to maintain it as its natural guardian. (*Matter of Doyle*, — Clark, 154; *Robalina v. Armstrong*, 15 Barb., 247; *People v. Kling*, 6 Barb., 866.)

(b) **Promises of putative father may be enforced.** — A putative father's promise to support a bastard child may be enforced at law. (*Moncrief v. Ely*, 19 Wend., 405; *Birdsall v. Edgerton*, 25 Wend., 619.)

(c) Infancy is no defense. (*People v. Moores*, 4 Den., 518.)

§ 840. When bastard, chargeable to the public, is born, or is likely to be born, application to be made to a justice of the peace or police justice.—If a woman be delivered of a bastard, or be pregnant of a child likely to be born such, and which is chargeable to a county, city or town, a superintendent of the poor of the county, or an overseer of the poor or other officer of the alms-house of the town or city where the woman is, must apply to a justice of the peace or police justice in the county to inquire into the facts of the case.

Id., § 5.

(a) **Jurisdiction of justice.** — A justice can only act in his county, and on proper official application. (*Sprague v. Eccleston*, 1 Lans., 74; *Wallsworth v. McCullough*, 10 Johns., 93; *Birdsall v. Edgerton*, 25 Wend., 619.)

(b) **Overseer of the poor.** — An overseer of the poor in bastardy proceedings is a "party" in such sense that the proceedings are void if there is affinity between him and the justice. (*Ravenburgh v. Henness*, 4 Lans., 268.)

(c) **Regular application necessary.** — The justice has no authority to make the preliminary examination or issue a warrant to arrest the putative father on his own motion; a regular application, as required by statute, is necessary. (*Sprague v. Eccleston*, 1 Lans., 74.)

§ 841. **Examination by the magistrate and warrant against the father.** — The magistrate must, by the examination of the woman on oath, and any other testimony which may be offered, ascertain the father of the bastard, and must issue his warrant, directed to a peace officer of the county, commanding him, without delay, to apprehend the father and bring him before the justice, for the purpose of having an adjudication as to the filiation of the bastard.

Id., § 6.

(a) **Mother's evidence inadmissible.** — It seems that where the mother of the alleged bastard is a married woman, she is not a competent witness to prove any fact which may be proved by other testimony. (*People v. Overseers of Ontario*, 15 Barb., 286.)

§ 842. **Justice designated as a magistrate, and person proceeded against as defendant.** — An officer issuing a warrant or making an examination, as provided in this chapter, is designated as a magistrate, and the person against whom the warrant is issued as the defendant.

New.

§ 843. **Warrant, when to be served in another county.** — If the defendant reside in another county than that in which the warrant issued, the magistrate must, by an indorsement thereon, direct the sum in which the defendant shall give security, and the officer must deliver the warrant to a justice of the peace or police justice in the city or town in which the defendant resides or is found. The magistrate to whom it is presented, on proof, under oath, of the signature of the magistrate who issued the warrant, must then indorse a direction thereon, that it be served in the county in which he resides, and the defendant may be arrested in that county accordingly. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

Id., § 771.

§ 844. **Magistrate in another county may take undertaking for support of bastard and mother, or for appearance of defendant at the sessions.** — When the defendant is arrested in another county, he must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take from the defendant an undertaking, with sufficient sureties, to the effect :

1. That he will indemnify the county, and town or city, where the bastard was or is likely to be born, and every other county, town or city, against any expense for the support of the bastard, or of its mother during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant ; or

2. That the defendant will appear and answer the charge at the next court of sessions of the county where the warrant was issued, and obey its order thereon.

Id., § 8.

(a) **Character of bond.**— The bond must be for either the one or the other of the two conditions, but not for both ; if it contain both conditions, that the obligor should appear and that he should indemnify, is a nullity. (*Hoogland v. Hudson*, 8 How., 843.)

(b) **Must follow statute.**— If the bond literally follow the statute, it is valid, however superfluous the provisions may be. (*People v. Mitchell*, 4 Sandf., 466.)

(c) An attorney cannot be surety. (Rule 5, Supreme Court ; see *People v. Tilton*, 18 Wend., 597.)

§ 845. **On giving undertaking, defendant to be discharged.**— When either of the undertakings mentioned in the last section is given, the magistrate must discharge the defendant, and must indorse a certificate of the discharge upon the warrant. He must also deliver the warrant, with the undertaking, to the officer, who must return it to the magistrate granting the warrant, by whom the same proceedings must be had, as if he had taken the undertaking.

Id., § 9.

The payment of costs is a condition precedent to a discharge. (*People v. Stowell*, 2 Den., 127.)

§ 846. **If undertaking not given, defendant to be taken before magistrate who issued the warrant.**— If the defendant do not give security, as provided in section eight hundred and

forty-four, the officer must take him before the magistrate who issued the warrant.

Id., § 10.

§ 847. **Before what magistrate in the same county, defendant is to be taken, when the magistrate issuing the warrant is unable to act.**— If, however, the magistrate who issued the warrant be absent or unable to act, the defendant must be taken before the nearest or most accessible magistrate in the same county. The officer must, at the same time, deliver to the magistrate the warrant, with his return indorsed and subscribed by him.

Id., § 73.

(a) **Substituted by agreement.**— If the justice first called in do not appear on an adjourned day, another may be substituted by agreement of the parties, entered on the minutes. (*People v. Barnett*, 3 Abb. N. C., 510.)

§ 848. **The magistrate to associate with himself another magistrate, and they to examine the matter.**— The magistrate before whom the defendant is brought, as provided in the last two sections, must immediately associate with himself another justice of the peace or police justice in the same county or city; and the two magistrates thus associated, must inquire into the charge, and must examine on oath, the woman who is the mother of or pregnant with the bastard in the presence of the defendant, in respect to the charge, and hear any testimony which may be offered in relation thereto.

Id., § 11.

§ 849. **Adjournment of examination; security from defendant.**— The magistrates may, on the application of the defendant, for good cause, adjourn the examination, not exceeding thirty days, upon the defendant giving an undertaking, with two sufficient sureties, to the effect that he will appear before the magistrate at the time appointed, or that the sureties will pay the sum mentioned therein, which must be fixed by the magistrate, and which must be a full indemnity for the expense of supporting the bastard and its mother, as provided in section eight hundred and fifty-one.

Id., §§ 12, 16.

(a) **Forfeiture of bond.**— Departing without leave after appearing forfeits the bond. (*People v. Jayne*, 27 Barb., 58; *People v. Boardman*, 24 How., 512.)

(b) *Id.*— And it is immaterial whether he intended to return or not. (*Id.*)

§ 850. **Determination of the case, and order of the magistrates.** — Upon the hearing the magistrates must determine who is the father of the bastard, and must proceed as follows :

1. If they determine that the defendant is not the father of the bastard, he must be forthwith discharged ;

2. If they determine that he is the father, they must make an order of filiation, specifying therein the sum to be paid weekly or otherwise by the defendant, for the support of the bastard ; and if the mother be indigent, the sum to be paid by the defendant for her support, during her confinement and recovery ;

3. They must certify the reasonable costs of arresting the defendant, and of the order of filiation ;

4. They must reduce their proceedings to writing, and subscribe them.

Id., § 18.

(a) **Adjudication a bar.**—Adjudication in favor of the defendant is a bar to any new proceeding against him for the same offense. (*Thayer v. Overseers*, 5 Hill, 443; 5 Den., 98; *People v. Tompkins*, Gen. Sess., 19 Wend., 154; *Dunham v. Monell*, H. & D., 377.)

(b) **Not appealable.**—An order of acquittal is not appealable. (*People v. Tompkins*, Gen. Sess., 19 Wend., 154; *Thayer v. Overseers of Hamilton*, 5 Hill, 443.)

(c) **Election to give bond.** — No order of filiation is necessary where the putative father elects to give the bond, he thereby admits his liability. (*People v. Heine*, 5 N. Y. Leg. Obs., 881.)

(d) **Effect of order of filiation.** — An order of filiation adjudging the bastard chargeable, and fixing the allowance to be paid by the putative father is conclusive on him till reversed, and the *onus* is on him to show a legal discharge from the obligation. (*Overseers of Hebron v. Ely*, Hill & Den. Supp., 379.)

(e) **Infant bound by an order.** — After an order of filiation an infant is bound by law to support his illegitimate child, and his bond is binding upon him notwithstanding his infancy. (*People v. Moores*, 4 Denio, 518.)

§ 851. **Defendant to pay the costs, and give undertaking for support of bastard and mother, or for appearance at sessions.** — If the defendant be adjudged to be the father, he must immediately pay the amount certified for the costs of the arrest and of the order of filiation, and enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect,

1. That he will pay weekly or otherwise, as may have been ordered, the sum directed for the support of the child, and of

the mother during her confinement and recovery, or which may be ordered by the court of sessions of the county; and that he will indemnify the county, and town or city where the bastard was or may be born [as the case may be], and every other county, town or city, which may have been or may be put to expense for the support of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the magistrates; or,

2. That he will appear at the next court of sessions of the county, to answer the charge and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother, as provided in the first subdivision of section eight hundred and forty-four.

2 R. S., 898, §§ 14, 16.

(a) **Validity of bond.**—A bond conditioned that the father will indemnify the county or appear at the sessions is valid; though it ought to have embraced but one of the alternatives. (*People v. Tilton*, 13 Wend., 597.)

(b) **Superfluity in a bond.**—If a bond require more than is required by statute it will be void. (*People v. Meighan*, 1 Hill, 298; *People v. Mitchell*, 4 Sandf., 466.)

(c) **Void bond; duplicity.**—A bond for both conditions held void, *e. g.*, for appearance and indemnity. (*Hoogland v. Hudson*, 8 How., 343; see, also, *People v. Mitchell*, 4 Sandf., 466; *People v. Moores*, 4 Den., 518; *People v. Stowell*, 2 Den., 127.)

§ 852. **On giving undertaking defendant to be discharged, otherwise to be committed.**—Upon a compliance with the provisions of the last section, the magistrates must discharge the defendant; but otherwise, they or either of them must, by warrant, commit him to the county jail, or in the city of New York, to the city prison of that city, until he be discharged by the court of sessions of the county, or deliver an undertaking, as prescribed by the last section.

Id., § 15.

The party may be committed either for want of bond or non-payment of costs. (*People v. Stowell*, 2 Den., 127.)

§ 853. **Commitment of defendant during examination.** During the examination, and until the defendant is discharged by the magistrate, he must remain in the custody of the officer who arrested him, unless an undertaking have been given for his

appearance, as provided in sections eight hundred and forty-four and eight hundred and forty-nine; and when committed to prison he must be actually confined therein.

Id., § 17. The form of warrant of commitment may be adapted to the nature of the case. (*People v. Stowell*, 2 Den., 127.)

§ 854. **Proceedings by magistrate when security is given by defendant on arrest out of the county.** — When security taken out of the county, for the appearance of the defendant at the court of sessions, as provided in section eight hundred and forty-four, is returned to the magistrate who issued the warrant, he must associate with himself another magistrate of the same county, and the magistrates thus associated must proceed as provided in sections eight hundred and forty-eight to eight hundred and fifty, both inclusive.

Id., § 18.

§ 855. **Examination in such case, and order thereon.** — The examination may be had and the order of affiliation made in the absence of the defendant, unless, before the order is made, he require of the magistrate issuing the warrant that the examination be had in his presence, in which case the examination must be had as if the defendant had originally appeared.

Id., § 19.

§ 856. **Magistrates may compel mother to disclose the father of the bastard; proceedings if she refuse.** — In making an examination authorized by this chapter, the magistrate issuing the warrant, or the magistrates making the examination, may compel the mother of a bastard, chargeable to a county, city or town, or a woman pregnant of a child likely to be born such, to disclose the name of the father of the bastard; or if she refuse to do so, may, by a warrant setting forth the cause thereof, at the expiration of one month from her delivery, if sufficiently recovered, commit her to the county jail, or, in the city of New York, to the city prison of that city, until she disclose the name of the father.

Id., § 20.

Non-access of husband, how proved. — The mother of a bastard who is married is incompetent to prove husband's non-access. (*People v. Overacres*, 15 Barb., 286.)

(b) **Cannot be forcibly examined.**— Cannot forcibly examine mother to establish pregnancy. (*People v. McCoy*, 45 How., 216.)

(c) **May commit for refusal.**— The justices have power to commit the mother for refusing to affiliate the child. (*Scott v. Ely*, 4 Wend., 555.)

§ 857. **If mother possess property, two magistrates may make an order that she pay for the support of the child.**— If the mother of a bastard, chargeable, or likely to become chargeable, as provided in section eight hundred and forty, be possessed of property in her own right, any two magistrates of the county or city where she is, on the application of any of the officers mentioned in that section, must examine into the matter, and may make an order charging the mother with the payment of money weekly, or otherwise, for the support of the bastard.

Id., § 21.

(a) **Father not relieved.**— The mother's ability to support the child does not relieve the father of his liability. (*People v. Corbett*, 8 Wend, 520; *People v. Haddock*, 12 id., 475.)

§ 858. **If she do not comply, she must be committed, or discharged on undertaking.**— If, after service of the order upon the mother, she do not comply therewith, she must be committed to the county jail, or in the city of New York, to the city prison of that city, until she comply, or enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect that she will appear at the next court of sessions of the county, to answer the matters stated in the order, and obey its order thereon, or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrates.

Id., § 22.

§ 859. **Magistrates may reduce amount directed to be paid by the father or mother; court of sessions may reduce or increase it.**— The magistrates, who have made an order against the father or mother of a bastard, as provided in sections eight hundred and fifty and eight hundred and fifty-seven, may, from time to time, for good cause, reduce the amount therein directed to be paid, and upon the application of any of the officers mentioned in section eight hundred and forty, the court of sessions of the county, upon ten days' notice to those

officers or to the father and mother of the bastard, may reduce or increase the amount so directed to be paid.

Id., § 23.

§ 860. **Proceedings against the father or mother absconding from their place of residence.** — If the father or mother of a bastard, or of a child likely to be born such, abscond from their place of residence, leaving the bastard chargeable, or likely to become chargeable to the public, a superintendent of the poor of the county, or an overseer of the poor or other officer of the alms-house of the town or city where the bastard was born, or is likely to be born, may apply to any two magistrates of the city or county where any property, real or personal, of the father or mother may be, for authority to take the same. Upon due proof of the facts on oath, to the satisfaction of the magistrates, they must issue their warrant, and proceed thereon in the manner provided in title eight of this part, in relation to persons absconding and leaving their children chargeable to the public.

Id., § 52.

CHAPTER II.

APPEALS FROM THE ORDERS OF MAGISTRATES, RESPECTING BASTARDS.

SECTION 861. Who may appeal, and in what cases.

862. Appeal, how taken.

863. Papers to be transmitted by magistrate, to court of sessions.

864. Court to hear the case ; evidence on hearing.

865. Court may affirm, vacate or modify the order, or adjourn the hearing till the bastard be born.

866. If woman be not pregnant, or be married before her delivery, or the child be not born alive, defendant to be discharged.

867. Order of the court, on affirmance.

868. Commitment of defendant, if he fail to give undertaking.

869. Undertaking for appearance on appeal, when forfeited.

870. When mother bound to appear at the sessions, court to proceed as upon an appeal.

871. When the court may make an order against the mother, for the support of the bastard.

872. Proceedings against the mother, on affirmance or modification of the order of the magistrates.

873, 874. Costs on appeal, when awarded and how paid.

SECTION 875. When order of filiation vacated, except on the merits, court may make a new order of filiation, or bind the defendant to appear.

876. If order of filiation be vacated, except on the merits, magistrates may proceed anew.

877. Court to inquire into circumstances of father or mother, committed for not giving undertaking to support bastard.

878. Father or mother unable to support the bastard, may be discharged.

879. Notice, before discharge, and examination of the matter.

880. Party cannot be discharged, but by the court.

§ 861. **Who may appeal, and in what cases.**— A person deeming himself aggrieved by the order of two magistrates, made pursuant to the last chapter, may appeal therefrom to the next court of sessions of the county; except that a person who has executed an undertaking to obey an order of filiation, and indemnify the public, as provided in section eight hundred and fifty-one, cannot appeal from any other part of the order mentioned in section eight hundred and fifty, than that which fixes the weekly or other allowance to be paid.

Id., § 24.

§ 862. **Appeal, how taken.**— When the father or mother of the bastard has entered into an undertaking for appearance at the next court of sessions of the county, as provided in sections eight hundred and fifty-one and eight hundred and fifty-eight, it is an appeal from the order of filiation or maintenance; and no other notice thereof is necessary. In any other case, the appeal is taken, by a written notice of at least ten days before the court, to the magistrates who made the order, and to the party affected thereby, or to the officer at whose instance it was obtained.

Id., § 24.

(a) **Effect of giving bond.**— If the party charged as father gives a bond to appear at the next general sessions, it operates as an appeal to the sessions. (*Stowell v. Overseers of Volney*, 5 Den., 98.)

§ 863. **Papers to be transmitted by magistrates, to court of sessions.**— The magistrates receiving an undertaking for appearance at the court of sessions, must transmit it to the court, before its opening, with a certified copy of the order appealed from.

Id., § 26.

§ 864. Court to hear the case; evidence on hearing.— The court must immediately, or at any other time it may appoint, proceed to hear the allegations and proofs of the parties; and the party in whose favor the order was made, must support it by evidence. If the mother of the bastard is dead or insane, her testimony on the examination before the magistrate is receivable in evidence.

Id., § 28.

(a) **Effect of appeal.**— An order appealed from as above is virtually a suit commenced before two justices and continued before the sessions, but which never reached final determination. (*Stowell v. Overseers of Volney*, 5 Den., 98; *Roy v. Torgoe*, 7 Wend., 358.)

§ 865. Court may affirm, vacate or modify the order, or adjourn the hearing till the bastard be born.— The court may affirm or vacate an order of filiation or maintenance, or may reduce or increase the sum ordered to be paid for the support of the bastard or its mother; and, disregarding defects in form in the order, must amend it according to the fact. If, when the appeal is heard, the bastard be not born, the court may adjourn the hearing until it be born, and in that case, must take an undertaking from the party appealing, for his appearance, in such sum and with such sureties as the court may deem sufficient.

Id., § 29.

An attorney cannot be surety. (Rule 5, Sup. Court.)

§ 866. If woman be not pregnant, or be married before her delivery, or the child be not born alive, defendant to be discharged.— If the woman alleged to be pregnant, be not so, or be married before her delivery, or the child be not born alive, the defendant must be discharged from custody or from the obligation of his undertaking, either by the court or magistrates, upon that fact being made to appear.

Id., § 30.

§ 867. Order of the court, on affirmance.— If, upon the hearing of the appeal, the court of sessions affirm an order of filiation or maintenance, it must require the defendant to enter into an undertaking, with sufficient sureties approved by the court, to the effect that he will pay, weekly or otherwise, according to the order as made by the magistrate or modified by the court, the sum directed for the support of the bastard, and of the

mother during her confinement and recovery; and that he will indemnify the county, and town or city where the bastard was or may be born [as the case may be], and every other county, town or city, which may have been put to expense for the support of the child or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court.

Id., § 81.

§ 868. Commitment of defendant, if he fail to give undertaking. — If, on judgment of affirmance; the defendant do not enter into an undertaking, as provided in the last section, he must be committed to the county jail, or in the city of New York, to the city prison of that city, until he do so, or be discharged by the court.

Id., § 82.

§ 869. Undertaking for appearance on appeal, when forfeited. — The undertaking for the appearance of the defendant at the court of sessions, upon an appeal, is forfeited by his neglect to appear, or to give the undertaking mentioned in the last two sections, unless he be discharged by the court.

Id., § 83.

(a) **Voluntary departure forfeits bond.** — A voluntary departure without leave after appearance forfeits the bond. (*People v. Jaynes*, 27 Barb., 58.)

§ 870. When mother bound to appear at the sessions; court to proceed as upon an appeal. — When the mother of a bastard is bound to appear at the court of sessions, or is committed as provided in section eight hundred and fifty-eight, the court must proceed in respect to the matter in the same manner as upon an appeal.

2 R. S., 903, § 34.

§ 871. When the court may make an order against the mother, for the support of the bastard. — If the court be satisfied that the mother has property in her own right, sufficient to enable her to support the bastard or contribute to its support, it must confirm the order mentioned in section eight hundred and fifty-seven, or may vary the sum ordered to be paid weekly

or otherwise ; or if not, it must discharge her from custody or from the obligation of her undertaking.

Id., § 85.

§ 872. **Proceedings against the mother, on affirmance or modification of the order of the magistrates.** — If the court affirm or modify the order, as provided in the last section, it must require the defendant to enter into an undertaking, with sufficient sureties approved by the court, to the effect that she will pay, weekly or otherwise, according to the order, as made by the magistrates or modified by the court, the sum directed for the support of the bastard, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court. If the undertaking be not given she must be committed in the manner provided in section eight hundred and sixty-eight.

Id., § 86.

§ 873. **Costs on appeal, when awarded and how paid.** — The court must award costs to the party in whose favor an appeal is determined. When awarded against county superintendents or overseers of the poor of a town, not liable for the support of its own poor, they must be paid by the county treasurer, on delivering to him a certified copy of the order and of the taxed costs, and must be charged by him to the town in the same county, liable to support the bastard, or if there be none, to the county. In the city of New York, when costs are awarded upon an appeal, to the person charged as the father or mother of the bastard, they must, upon the production of similar vouchers be paid by the comptroller of that city, and charged to the appropriation made to the commissioners of charities and corrections thereof.

Id., § 87.

§ 874. **Costs on appeal, when awarded and how paid.** — In other cases, the payment of the costs may be enforced by the court, as in a civil action. If the party against whom they are awarded, reside out of the jurisdiction of the court, an action may be brought on the order, by the party entitled to the costs, in which the production of a certified copy of the order and of the taxed costs is conclusive evidence.

Id., § 88.

§ 875. **When order of filiation vacated, except on the merits, court may make a new order of filiation, or bind the defendant to appear.** — If the court vacate an order of filiation for any other cause than upon the merits, it must proceed, and may make an original order of filiation, in the manner prescribed in the second subdivision of section eight hundred and fifty, or bind the person charged in an undertaking, in a sum and with sureties approved by the court, to appear at the next court of sessions.

Id., § 39.

§ 876. **If order of filiation be vacated, except on the merits, magistrates may proceed anew.** — If the order be vacated for any other cause than on the merits, and the person charged be bound as provided in the last section, the same proceedings may be had by the magistrate for the apprehension of the defendant, and for making an order of filiation, and for the commitment of the defendant for not giving an undertaking, as are authorized in the first instance. And the same proceedings must be subsequently had in all respects.

Id., § 40.

§ 877. **Court to inquire into circumstances of father or mother committed for not giving undertaking to support the bastard.** — When a person is committed to prison, charged as the father of a bastard, or of a child likely to be born a bastard, and when the mother of a bastard is so committed for not giving an undertaking to support the bastard, or to indemnify the public, the court must inquire, from time to time, into the circumstances and ability of the father or mother to support the bastard and to procure security therefor.

Id., § 41.

§ 878. **Father or mother unable to support the bastard may be discharged.** — If the court be at any time satisfied that the father or mother is wholly unable to support the bastard, or to contribute to its support, or to procure security therefor, it may, in its discretion, order the father or mother to be discharged from imprisonment.

Id., § 42.

§ 879. Notice before discharge, and examination of the matter. — Before granting the order the court must be satisfied that reasonable notice has been given to the overseers of the poor, or to the county superintendents or chief officers of the alms-house, at whose instance the party was committed, of the intention to apply for a discharge, and must hear the allegations and proofs of the superintendents, overseers or officers, and may examine the party applying on oath respecting the subject of the application.

Id., § 43.

§ 880. Party cannot be discharged, but by the court. — A person committed, as provided in section eight hundred and seventy-seven, cannot be discharged from imprisonment, except by the court of sessions of the county.

Id., § 44.

CHAPTER III.

ENFORCEMENT OF THE UNDERTAKING FOR THE SUPPORT OF THE BASTARD OR ITS MOTHER, OR FOR APPEARANCE ON APPEAL.

SECTION 881. Court to order prosecution of undertaking, when forfeited; by whom prosecuted.

882. In whose name undertaking to be prosecuted.

883. Evidence in the action, and measure of damages

884. For a subsequent breach of the undertaking, new action may be brought.

885. Costs, how recovered, when awarded against the plaintiff.

886. Action may be maintained on the order of the magistrates or court.

§ 881. Court to order prosecution of undertaking, when forfeited; by whom prosecuted. — If an undertaking for the appearance at the court of sessions, of a person charged as the father or mother of a bastard, be forfeited, the court may order it to be prosecuted; and the sum mentioned therein may be recovered, and when collected, must, except in the city of New York, be paid to the county treasurer, and by him credited to the town in the same county, liable to the support of the bastard, or if there be none, to the county. In the city of New York, the court must order the undertaking to be prosecuted by

the commissioners of charities and corrections, and when collected, it must be paid into the city treasury. In every other county, it must be prosecuted by the district attorney.

Id., § 46.

§ 882. **In whose name undertaking to be prosecuted.** — When an undertaking to obey an order, in relation to the support of a bastard, or of a child likely to be born a bastard, or of its mother, is forfeited, it may be prosecuted in the name of the county superintendents of the county or the overseers of the poor of the town, which was liable for the support of the bastard, or which may have incurred any expense in the support of the bastard, or of its mother, during her confinement and recovery; or in the city of New York, in the name of the corporation of that city.

Id., § 47.

Order conclusive unless appealed from. — The order of affiliation conclusive unless appealed from. (*Wallworth v. Mead*, 9 Johns., 367; *People v. Relyea*, Id., 195; *Rockfeller v. Donnelly*, 8 Cow., 623; *People v. Corbett*, 8 Wend., 520; *Overseers v. Coz*, 7 Cow., 235.)

§ 883. **Evidence in the action, and measure of damages.** — In the action mentioned in the last section, it is not necessary to prove the actual payment of money by a county superintendent, overseer of the poor, officer of an alms-house, or other person; but the neglect to pay a sum ordered to be paid by competent authority, for the support of the bastard, or of its mother, is a breach of the undertaking, and the measure of the damages is the sum ordered to be paid, and which was withheld at the time of the commencement of the action, with interest thereon.

Id., § 48.

(a) **Burden of proof.** — In such an action the burden is on the defendant to show himself exonerated from the payment. (*Wallworth v. Mead*, 9 Johns., 367; *Rockfeller v. Donnelly*, 8 Cow., 623; *People v. Corbett*, 8 Wend., 520; *People v. Haddock*, 12 id., 475.)

(b) **Money recovered back.** — Money may be recovered back if mother not pregnant. (*Rheel v. Hicks*, 25 N. Y., 289.)

§ 884. **For a subsequent breach of the undertaking new action may be brought.** — For a breach of the undertaking, after the recovery of damages or the commencement of an action, another action may, in the same manner, be brought.

The money collected upon the undertaking must be paid, and credited, in the manner provided in section eight hundred and eighty-one.

Id., § 49.

§ 885. **Costs, how recovered, when awarded against the plaintiff.** — If, in the action, costs be awarded against the plaintiffs, they may be recovered, as follows:

1. If against the corporation of the city of New York, in the same manner as in any other action;

2. If against county superintendents or overseers of the poor, they must, upon the delivery of a transcript of the judgment, be paid by the county treasurer, and by him charged to the town in the same county, liable for the support of the bastard, or if there be none, to the county.

Id., § 50.

(a) Taxable costs are to be allowed. (*Ontario Co. v. Moore*, 12 Wend., 278; see, also, *Washburn v. Overseers of Hebron*, 9 Johns., 119.)

§ 886. **Action may be maintained on the order of the magistrates or court.** — An action may be maintained by the parties authorized by section eight hundred and eighty-two, upon an order made by two magistrates, or by a court of sessions, for the payment of a sum weekly or otherwise, for the support of the bastard or its mother, notwithstanding an undertaking may have been given to comply with the order; and in case of the death of the person against whom the order was made, an action may be maintained thereon against his executors or administrators. But when an undertaking is given to appear at the next court of sessions, no action can be brought on the order until it is affirmed by the court.

Id., § 51.

TITLE VI.

OF PROCEEDINGS RESPECTING VAGRANTS.

SECTION 887. Who are vagrants.

888. Proceedings before magistrate.

889. Child, how kept.

890. Peace officers, when required by any person, to carry vagrant before a magistrate for examination.

891. Vagrant, when to be convicted; form of certificate of conviction.

892. Certificate to constitute record of conviction, and to be filed; commitment of vagrant.

893. Children begging, how disposed of.

894. Peace officers to arrest and pursue a person disguised, and take him before a magistrate.

895. Private citizen may do so, without warrant.

896. Peace officer may require aid; duty of persons required to aid him.

897. Neglect or refusal to aid peace officer, without lawful cause, a misdemeanor; punishment.

898. Magistrate may depute an elector of the county to make arrest of person disguised; if his name be not known, fictitious name may be used.

§ 887. Who are vagrants.—The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment;

2. A person who, being an habitual drunkard, abandons, neglects or refuses to aid in the support of his family;

3. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health;

4. A common prostitute who has no lawful employment, whereby to maintain herself;

5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;

6. A person wandering abroad and lodging in taverns, groceries, ale-houses, watch or station-houses, out-houses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself;

7. A person, who, having his face painted, discolored, covered

or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure;

8. Any child between the age of five and fourteen, having sufficient bodily health and mental capacity to attend the public school, found wandering in the streets or lanes of any city or incorporated village, a truant, without any lawful occupation.

2 R. S., 886, § 1.

(a) **Prostitute, vagrancy.**—Proof that the prisoner was a common prostitute does not authorize her conviction and commitment as a vagrant. (*Forbes's case*, 11 Abb., 53; 19 How., 457; *People v. Forbes*, 4 Park., 611; see, also, *Gray's case*, 11 Abb., 56; 4 Park., 616.)

§ 888. **Proceedings before magistrate.**—When complaint is made to any magistrate by any citizen or peace officer against any vagrant under subdivision eight of the last section, such magistrate must cause a peace officer to bring such child before him for examination, and shall also cause the parent, guardian or master of such child, if the child has any, to be summoned to attend such examination.

If, thereon, the complaint shall be satisfactorily established, the magistrate must require the parent, guardian or master to enter into an engagement in writing to the corporate authorities of the city or village, that he will restrain such child from so wandering about, will keep him in his own premises or in some lawful occupation, and will cause him to be sent to some school, at least four months in each year, until he become fourteen years old.

The magistrate may, in his discretion, require security for the faithful performance of such engagement.

If the child has no parent, guardian or master, or none can be found, or if the parent, guardian or master refuse or neglect, within a reasonable time, to enter into such engagement, and to give such security if required, the magistrate shall by warrant commit the child to such place as shall be provided for his reception. If no such place for his reception has been provided, he shall commit him to the alms-house of the county.

2 R. S., 97, § 1.

§ 889. **Child, how kept.**—Every child received pursuant to the last section, shall be kept until discharged by the overseers of the poor or the commissioners of the alms-house of the city or village, and may be bound out as an apprentice by them, or either

of them, with the consent of any magistrate, or any of the aldermen of the city, or any trustee of an incorporated village where he may be, in the same manner, for the same periods and subject to the same provisions in all respects as directed in respects to parents whose children have become chargeable on any town.

Id., § 8.

§ 890. **Peace officers, when required by any person, to carry vagrant before a magistrate for examination.** — A peace officer must, when required by any person, take a vagrant before a justice of the peace or police justice of the same city, village or town, or before the mayor, recorder, or city judge, or judge of the general sessions of the same city, for the purpose of examination.

2 R. S., 836, §§ 2, 5.

(a) **Vagrant; how arrested.** — A vagrant may not be arrested without a warrant under a city ordinance. (*People ex rel. Kingsley*, 22 Hun, 800.)

§ 891. **Vagrant, when to be convicted; form of certificate of conviction.** — If the magistrate be satisfied, from the confession of the person so brought before him, or by competent testimony, that he is a vagrant, he must convict him, and must make and sign, with his name of office, a certificate substantially in the following form:

"I certify that A. B., having been brought before me, charged with being a vagrant, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a person [pursuing the description contained in the subdivision of section eight hundred and eighty-seven, which is appropriate to the case], I have adjudged that he is a vagrant.

"Dated at the *town* [or city] of _____, the _____ day of _____, 18 ____.

"E. F.,

"*Justice of the peace of the town of _____*," [or as the case may be.]

Id., § 8. What amounts to a confession. (*Brown v. People*, 4 Barb., 164.)

§ 892. (Amended 1882.) **Certificate to constitute record of conviction, and to be filed; commitment of vagrants.** — The magistrate must immediately cause the certificate which constitutes the record of conviction to be filed in the office

of the clerk of the county, and must, by a warrant signed by him with his name of office, commit the vagrant, if not a notorious offender, and a proper object for such relief, to the county poor-house, if there be one, or to the alms-house or poor-house of the city, village or town, for not exceeding six months at hard labor, or if the vagrant be an improper person to be committed, he must be committed for a like term to the county jail, or in the city of New York, to the city prison or penitentiary of said city, or in the county of Kings, to the penitentiary of that county.

Id., § 3.

§ 893. **Children begging, how disposed of.** — If a child be found begging for alms, or soliciting charity from door to door, or in a street, highway, or public place in a city, village or town, a justice of the peace or police justice, on complaint and proof thereof, must commit the child to the county poor-house or other place provided for the support of the poor, to be kept, employed and instructed in useful labor, until discharged by the county superintendents of the poor, or in the city of New York, by the commissioners of charities and corrections, or bound out as an apprentice by them, as prescribed by special statutes.

Id., § 4.

§ 894. (Amended 1882.) **Peace officers to arrest and pursue a person disguised, and take him before a magistrate.** — It is the duty of every peace officer of the county, city, village, or town, where a person described in the seventh subdivision of section eight hundred and eighty-seven is found, to arrest and take him before a magistrate mentioned in section eight hundred and eighty-eight, to be proceeded against as a vagrant.

Id., § 5.

§ 895. **Private citizens may do so without warrant.** — A private citizen of the county may also, without warrant, exercise the powers conferred upon a peace officer by the last section.

Id., § 6.

§ 896. **Peace officer may require aid; duty of persons required to aid him.** — In the execution of the duties imposed by section eight hundred and ninety-four, the peace officer may command the aid of as many male inhabitants of his county, city, village or town, as he may think proper; and a citizen so com-

manded, may provide himself or be provided with, such means and weapons as the officer giving the command may designate.

Id., § 7.

§ 897. **Neglect or refusal to aid peace officer, without cause, a misdemeanor; punishment.** — A person commanded to aid the officer, as prescribed in the last section, and who without lawful cause refuses or neglects to do so, is guilty of a misdemeanor, and is punishable by a fine not exceeding two hundred and fifty dollars, or by imprisonment not exceeding one year, or both.

Id., § 8.

§ 898. **Magistrate may depute an elector of the county to make arrest of person disguised; if his name be not known, fictitious name may be used.** — A magistrate to whom complaint is made against a person charged as a vagrant, as described in the seventh subdivision of section eight hundred and eighty-seven, may, by a warrant signed by him, with his name of office, depute an elector of the county to arrest and bring the vagrant before him to answer the complaint; and if the name of the person complained of be not known, he may be described in the warrant and in all subsequent proceedings thereon, by a fictitious name.

Id., § 9.

TITLE VII.

OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.

SECTION 899. Who are disorderly persons.

900. On complaint, warrant to be issued.

901. On confession or proof that he is a disorderly person, security to be required.

902. If security given, defendant to be discharged; if not, to be convicted; form of certificate.

903. Certificate, to constitute record of conviction, and to be filed; commitment thereon.

904. Undertaking, when forfeited.

905. How prosecuted, and proceeds how applied.

906. When new security may be required, or defendant committed after recovery on undertaking.

907. Defendant committed for not giving security, how discharged.

SECTION 908. Keeper of prison, to return list of disorderly persons committed to court of sessions.

909. Examination of the case by the court.

910. Court may discharge, or authorize the binding out of disorderly person.

911. Court may also commit him to prison; nature and duration of imprisonment.

912. Order to procure materials and implements, and to compel him to work.

913. Expense of materials or implements, how paid for, and proceeds of labor, how disposed of.

§ 899. Who are disorderly persons.—The following are disorderly persons :

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means ;

2. Persons who threaten to run away and leave their wives or children a burden upon the public ;

3. Persons pretending to tell fortunes, or where lost or stolen goods may be found ;

4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, or other disorderly persons ;

5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming ;

6. Jugglers, common showmen and mountebanks, who exhibit or perform for profit, puppet shows, wire or rope dancers, or other idle shows, acts or feats ;

7. Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming, therewith ;

8. Persons who play, in a public highway or place, with cards, dice or any other apparatus or device for gaming ;

9. Habitual criminals within the provisions of this Code.

§ R. S., 893, § 1.

(a) **Refusal to support wife.**—A person refusing to support or permit his wife to reside with him is within the statute. (*People v. Carroll*, 3 Park, 73.)

(b) **Former husband living.**—Refusing to live with or support a wife on the ground of a former husband being alive, not within the statute. (*Ben-nac v. People*, 4 Barb., 164.)

(c) **Disorderly house defined.**—A house which is a resort for immoral purposes is a disorderly house. (*People v. Rowland*, 1 Wh. C. C., 286.)

§ 900. **On complaint, warrant to be issued.**— Upon complaint on oath, to a justice of the peace or police justice of a city, village or town, or to the mayor, recorder, city judge or judge of the general sessions of the city, against a person, as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant, and bring him before the magistrate for examination.

Id., § 2.

§ 901. **On confession or proof that he is a disorderly person, security to be required.**— If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect :

1. If he be a person described in the first or second subdivision of section eight hundred and ninety-nine, that he will support his wife and children, and will indemnify the county, city, village or town against their becoming, within one year, chargeable upon the public ;

2. In all other cases, that he will be of good behavior for the space of one year ;

Or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrate.

Id., § 2.

(a) **Not entitled to jury trial.**— A person under this section is not entitled to a jury trial. (*Duffy v. People*, 1 Hill, 355; 6 *id.*, 75; *Bennac v. People*, 4 Barb., 164; 23 Wend., 48.)

(b) **Former husband living.**— Refusing to live with one's wife or to support her on the ground that her former husband is still living, is not a ground of conviction. (*Bennac v. People*, 4 Barb., 164.)

(c) **Confession.**— A confession on which a justice may convict, means a plea of guilty or its equivalent. (*Id.*)

(d) **Must proceed summarily.**— The justice must proceed summarily; he cannot organize a court of special sessions to try the prisoner. (*People v. Carroll*, 8 Park., 73.)

§ 902. **If security given, defendant to be discharged; if not, to be convicted; form of certificate.**— If the undertaking be given, the defendant must be discharged. But if not, the magistrate must convict him as a disorderly person, and must

make, and sign with his name of office, a certificate in substantially the following form :

"I certify that A. B., having been brought before me charged with being a disorderly person, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a [pursuing the description contained in the subdivision of section eight hundred and ninety-nine, which is appropriate to the case], I have adjudged that he is a disorderly person.

"Dated at the town [or 'city'] of ; the day of , 18

"E. F.,

"Justice of the peace of the town of

"[Or as the case may be.]"

Id., § 2.

§ 903. (Amended 1882.) Certificate to constitute record of conviction, and to be filed ; commitment thereon.—

The magistrate must immediately cause the certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must, by a warrant signed by him with his name of office, commit the defendant to the county jail, or in the city of New York, to the city prison or penitentiary of that city, or in the county of Kings, to the penitentiary of that county, for not exceeding six months at hard labor, or until he give the security prescribed in section nine hundred and one.

Id., § 2. The justice has no power to commit until his record is made up and filed. (*Bennet v. People*, 4 Barb., 164.)

§ 904. Undertaking, when forfeited.—The undertaking mentioned in section nine hundred and one is forfeited by the commission of any of the acts which constitute the person by whom it was given a disorderly person, and in the case of a person described in the seventh and eighth subdivisions of section eight hundred and ninety-nine, by his playing or betting, at one time or sitting, for money or property exceeding the value of two dollars and fifty cents.

Id., § 3.

§ 905. How prosecuted, and proceeds how applied.—When an undertaking is forfeited, it may be prosecuted in the

name of the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, in the name of the corporation of that city, and the sum collected in the action must be paid into the county or city treasury, as the case may be, for the benefit of the poor.

Id., § 4.

It is no defense to the action that no expense has been incurred. (*People v. Pettit*, 3 Hun, 416.)

§ 906. When new security may be required, or defendant committed after recovery on undertaking. — Upon a recovery on the undertaking, the court in which it is had, may require from the defendant new security in the manner provided in section nine hundred and one, or if he fail to give it, may commit him in the manner provided in section nine hundred and three.

Id., § 5.

§ 907. Defendant committed for not giving security ; how discharged. — A person committed as a disorderly person, on failure to give security, may be discharged by any two justices of the peace or police justices in the county, upon giving security as originally required, pursuant to section nine hundred and one.

Id., § 6.

§ 908. Keeper of prison, to return list of disorderly persons committed to court of sessions. — The keeper of every prison to which disorderly persons may be committed, must return to the court of sessions of the county, on the first day of each term, a list of the persons so committed and then in his custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.

Id., § 7.

§ 909. Examination of the case by the court. — The court of sessions must thereupon inquire into the circumstances of each case, and hear any proof that may be offered, and must examine the record of conviction, which is evidence of the facts contained in it, until disproved.

Id., § 8.

§ 910. Court may discharge, or authorize the binding out of disorderly person. — The court may discharge a person so committed from imprisonment, either absolutely or upon his giving security as provided in section nine hundred and one, or if he be a minor, may authorize the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, commissioners of charities and corrections, to bind him out in some lawful calling as a servant, apprentice, mariner or otherwise, until he be of age; or if he be of age, to contract for his service with any person, as a laborer, servant, apprentice, mariner or otherwise, for not exceeding one year. The binding out or contract, pursuant to this section, has the same effect as the indenture of an apprentice, with his own consent and that of his parents, and subjects the person bound out or contracted, to the same control of his master and of the court of sessions of the county, as if he were bound as an apprentice.

Id., § 9.

§ 911. Court may also commit him to prison; nature and duration of imprisonment. — The court may also, in its discretion, order a person convicted as a disorderly person, to be kept in the county jail, or in the city of New York, in the city prison or penitentiary of that city, for a term not exceeding six months at hard labor.

Id., § 10.

§ 912. Order to procure materials and implements, and to compel him to work. — If there be no means provided in the prison for employing the offender at hard labor, the court may direct the keeper to furnish him such employment as it may specify, and for that purpose to purchase materials and implements, not exceeding a prescribed value, and to compel the offender to perform the work allotted to him. The expenses incurred in carrying the order into effect must be paid to the keeper by the county treasurer, upon the delivery to him of the order of the court, and an account under the oath of the keeper, of the materials and implements furnished.

Id., §§ 11, 12.

§ 913. Expense of materials or implements, how paid for, and proceeds of labor, how disposed of. — The keeper

must sell the produce of the labor of the offender, and must account for the cost of the materials or implements purchased, and for one-half of the surplus, to the board of supervisors, and pay it into the county treasury, and pay the other half of the surplus to the person by whom it was earned, on his discharge from imprisonment. He must also account to the court, when required, for the materials or implements purchased, and for the disposition of the proceeds of the labor of the offender.

Id., § 13.

TITLE VIII.

OF PROCEEDINGS RESPECTING THE SUPPORT OF POOR PERSONS.

SECTION 914. Who may be compelled to support poor relatives.

- 915. Order to compel a person to support a poor relative, by whom and how applied for to court of sessions.
- 916. Court to hear the case and make order of support.
- 917. Support, when to be apportioned among different relatives.
- 918. Order, to prescribe time during which support is to continue, or may be indefinite; when and how order may be varied.
- 919. Costs, by whom to be paid and how enforced.
- 920. Action on the order, on failure to comply therewith.
- 921. Parents leaving their children chargeable to the public, how proceeded against.
- 922. Seizure of their property; transfer thereof, when void.
- 923. Warrant and seizure, when confirmed or discharged; direction of the court thereon.
- 924. Warrant, in what cases to be discharged.
- 925. Sale of the property seized and application of its proceeds.
- 926. Powers of superintendents of poor.

§ 914. Who may be compelled to support poor relatives. The father, mother and children, of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepid, so as to be unable by work to maintain himself, must at their own charge, relieve and maintain him in a manner to be approved by the overseers of the town where he is, or in the city of New York, by the commissioners of charities and corrections.

2 R. S., 808, § 1.

(a) **Who must support relatives.** — A grand child is liable to support grand parents. (*Ex parte Hunt*, 5 Cow., 284.)

(b) **Husband not bound to support step-children.**—A husband is not bound to maintain wife's bastard children born before marriage. (*Menden v. Cox*, 7 Cow., 235.)

(c) Nor of his wife's mother. (*Anon.*, 3 N. Y. Leg. Obs., 374.)

(d) **Liability of children several.**—Two out of five children of a poor person may be ordered to support him; and as their liability is several, they may be ordered to contribute in unequal amounts. (*Stone v. Burgess*, 2 Lans., 439; 47 N. Y., 521.)

(e) **No common-law obligation.**—There is no common-law obligation on the part of a child to support a parent; it is purely statutory. (*Edwards v. Davis*, 16 Johns., 281.)

§ 915. **Order to compel a person to support a poor relative, by whom and how applied for, to court of sessions.** If a relative of a poor person fail to relieve and maintain him, as provided in the last section, the overseers of the poor of the town where he is, or in the city of New York, the commissioners of charities and corrections may apply to the court of sessions of the county where the relative dwells, for an order to compel such relief, upon at least ten days' written notice, served personally, or by leaving it at the last place of residence of the person to whom it is directed, in case of his absence, with a person of suitable age and discretion.

Id., § 2.

(a) **Ability of relative to support.**—Where a relative of a poor person is of sufficient ability, a previous order is not necessary to give jurisdiction to the sessions. (*Anon.*, 3 N. Y., Leg. Obs., 354.)

(b) **Action by superintendents of the poor.**—The superintendents of the poor cannot sustain an action against a husband for the maintenance of his wife as a pauper. (*Norton v. Rhodes*, 18 Barb., 100.)

(c) To convict a husband of deserting his wife under the act of 1871, chapter 395, it must be shown that she has no adequate means of support, and is a burden upon the public. (*People v. Walsh*, 11 Hun, 292.)

§ 916. **Court to hear the case, and make order of support.**—At the time appointed in the notice, the court must proceed summarily to hear the allegations and proofs of the parties, and must order such of the relatives of the poor person, mentioned in section nine hundred and fourteen, as were served with the notice and are of sufficient ability, to relieve and maintain him, specifying in the order the sum to be paid weekly for his support, and requiring it to be paid by the father, or if there be

none, or if he be not of sufficient ability, then by the children, or if there be none, or if they be not of sufficient ability, then by the mother.

Id., § 8.

Where the court of sessions has made an order on a person for the support of an indigent parent at his own house, there can be no recovery against him for her support elsewhere, so long as he is willing to obey the order. (*Converses v. McArthur*, 17 Barb., 410; *Duel v. Lamb*, 1 S. C., 66.)

§ 917. Support, when to be apportioned among different relatives.— If it appear that any such relative is unable wholly to maintain the poor person, but is able to contribute toward his support, the court may direct two or more relatives, of different degrees, to maintain him, prescribing the proportion which each must contribute for that purpose; and if it appear that the relatives are not of sufficient ability wholly to maintain him, but are able to contribute something, the court must direct the sum, in proportion to their ability, which they shall pay weekly for that purpose.

Id., § 4.

Two out of five of the children of a poor person may be ordered to support him, and they may be ordered to contribute thereto in unequal amounts, their liability being several. (*Stone v. Burgess*, 2 Lans., 439; 47 N. Y., 521.)

§ 918. Order to prescribe time during which support is to continue, or may be definite; when and how order may be varied.— The order may specify the time during which the relatives must maintain the poor person, or during which any of the sums directed by the court are to be paid or it may be indefinite, or until the further order of the court. The court may from time to time vary the order, as circumstances may require, on the application either of any relative affected by it, or of an officer on whose application the order was made, upon ten days' written notice.

Id., § 5.

§ 919. Costs, by whom to be paid, and how enforced.— The costs and expenses of the application must be ascertained by the court, and paid by the relatives against whom the order is made; and the payment thereof, and obedience to the order of

maintenance, and to any order for the payment of money, may be enforced by attachment.

Id., § 6.

And they are responsible for the costs awarded on granting the order. (*Id.*)

The ability to support may consist in the ability to earn daily labor. (*Bernardus v. Williamson*, 1 Wh. C. C., 234.)

§ 920. Action on the order on failure to comply therewith. — If a relative, required by an order of the court, to relieve or maintain a poor person, neglect to do so in the manner approved by the officers mentioned in section nine hundred and fourteen, and neglect to pay to them weekly the sum prescribed by the court, the officers may maintain an action against the relative, and recover therein the sum prescribed by the court, for every week the order has been disobeyed, to the time of the recovery, with costs, for the use of the poor. In the city of New York, the action must be in the name of the corporation of that city.

Id., § 7.

What amounts to a breach of the order.— The indigent party cannot choose place of residence. (*Converse v. McArthur*, 17 Barb., 410; *Duel v. Lamb*, 1 S. C., 66.)

§ 921. Parents leaving their children chargeable to the public, how proceeded against. — When the father, or the mother being a widow or living separate from her husband, absconds from the children, or a husband from his wife, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother or husband is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding.

Id., § 8.

See *Downing v. Rugar*, 21 Wend., 188, and *People v. Overseers of Triangle*, 23 Barb., 386.

§ 922. Seizure of their property; transfer thereof when void. — The officers so applying may seize and take the property, wherever it may be found in the same county; and are

vested with all the right and title thereto, which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next court of sessions of the county where they reside, there to be filed.

Id., § 9.

§ 923. Warrant and seizure, when confirmed or discharged; direction of the court thereon. — The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied towards the maintenance of the children or wife of the person absconding.

Id., § 10.

In case of a warrant and seizure of property issued under this statute, the court must take evidence and examine into the merits. (*People v. Overseers*, 23 Barb., 236.)

§ 924. Warrant, in what cases to be discharged. — If the party against whom the warrant issued, return and support the wife or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of New York, to the commissioners of charities and corrections, that the wife or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

Id., § 11.

§ 925. Sale of the property seized and application of its proceeds. — The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor,

the officers charged therewith must apply the same to the support of the wife or children so abandoned ; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the court of sessions of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

Id., § 12.

§ 926. **Powers of superintendents of poor.** — In those counties where all the poor are a charge upon the county, the superintendents of the poor are vested with the same powers, as are given by this title to the overseers of the poor of a town, in respect to compelling relatives to maintain poor persons, and in respect to the seizure of the property of a parent absconding and abandoning his family ; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

Id., § 13.

TITLE IX.

OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES AND SERVANTS.

SECTION 927. Complaint against apprentice or servant for absenting himself or refusing to serve, or for a misdemeanor or ill behavior.

928. Warrant, when complaint is made in the absence of the defendant.

929. Warrant, by whom and how executed.

930. Hearing the complaint, and committing or discharging the defendant.

931. Complaint against the master for cruelty, misusage or violation of duty.

932. Hearing the complaint, and dismissing it or discharging the apprentice or servant.

933. Preceding sections not applicable to apprentice with whom money is received or agreed for.

934. Complaint against master in such case, and direction thereon.

935. If complaint not compromised, the master to be held to appear at sessions.

936. Proceedings thereon and order of the court.

SECTION 937. Complaint by master against clerk or apprentice, where money is paid or agreed for; clerk or apprentice, when held to appear at sessions.

938. Proceedings thereon and order of the court.

939, 940. Indenture or contract of service, how assigned on death of master.

§ 927. **Complaint against apprentice or servant, for absenting himself, or refusing to serve, or for a misdemeanor or ill behavior.** — If an apprentice or servant, lawfully bound to service as prescribed by special statutes, willfully absent himself therefrom, without the leave of his master, or refuse to serve according to his duty, or be guilty of any misdemeanor or ill behavior, his master may make complaint of the facts under oath before a justice of the peace or police justice in the county or before the mayor, recorder or city judge of the city where he resides.

3 R. S., 178, §§ 40, 41.

§ 928. **Warrant, when complaint is made in the absence of the defendant.** — If the complaint be made in the absence of the defendant, and the facts be proved to the satisfaction of the magistrate, he must issue a warrant signed by him, with his name of office, to a peace officer of the county or city, commanding him to arrest the defendant and bring him before the magistrate forthwith, or at a specified time and place, to answer the complaint.

Id., § 42.

§ 929. **Warrant, by whom and how executed.** — The peace officer must accordingly execute the warrant by arresting the defendant and taking him before the magistrate.

Id., § 42.

§ 930. **Hearing the complaint, and committing or discharging the defendant.** — The magistrate must immediately, or at a time to which he may, for good cause, adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint appear to be well founded, must commit the defendant to the county jail, or in the city of New York to the city prison of that city, for not exceeding one month, at hard labor, where he must be confined in a room with no other person; or may, by a certificate signed by him with his name of office,

discharge the defendant from the service of his master, and the master from all obligations to the defendant.

Id., § 43.

§ 931. **Complaint against the master for cruelty, misusage or violation of duty.**—If a master be guilty of cruelty, misusage, refusal of necessary provisions or clothing, or any other violation of duty toward his apprentice or servant, as prescribed by special statutes, or by the indenture or contract of service, the apprentice or servant may make complaint, on oath, to any of the magistrates mentioned in section nine hundred and twenty-seven, who must summon the defendant before him at a specified time and place.

Id., § 44.

§ 932. **Hearing the complaint, and dismissing it or discharging the apprentice or servant.**—The magistrate must immediately, or at a time to which he may, for good cause, adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint be well founded, must, by a certificate under his hands, with his name of office, discharge the apprentice or servant from the service of his master; or if not, he must, by a similar certificate, dismiss the complaint.

Id., § 44.

§ 933. **Preceding sections not applicable to apprentice with whom money is received or agreed for.**—The preceding sections of this title do not extend to an apprentice whose master has received, or is entitled to receive, a sum of money with him, as a compensation for his instruction.

Id., § 45.

§ 934. **Complaint against master in such case, and direction thereon.**—Where money is paid or agreed to be paid, on binding out a clerk or apprentice, he may make the complaint mentioned in section nine hundred and thirty-one, and the magistrate to whom it is made must examine it, as provided in section nine hundred and thirty-two, and on such examination may make such order and direction between the parties as the justice of the case may require.

Id., § 46.

§ 935. **If complaint not compromised, the master to be held to appear at sessions.** — If, in the case mentioned in the last section, the complaint cannot be compromised, the magistrate must take a written undertaking from the master, for his appearance at the next court of sessions of the county, in a sum, and with sureties approved by him.

Id., § 47.

§ 936. **Proceedings thereon and order of the court.** — Upon hearing the parties, the court may, by an order entered upon the minutes, direct that the clerk or apprentice be discharged from service, and that the money paid or agreed for in binding him out, be refunded, if paid, to the person who advanced it, or his personal representatives, or if not paid, that it be discharged, and that any security given therefor be delivered up or canceled.

Id., § 48.

§ 937. **Complaint by master against clerk or apprentice, where money is paid or agreed for ; clerk or apprentice when held to appear at sessions.** — The master of a clerk or apprentice, where money is paid or agreed for on binding him out, may make the complaint mentioned in section nine hundred and twenty-seven, and the magistrate to whom it is made must proceed thereupon, as provided in sections nine hundred and twenty-eight to nine hundred and thirty, both inclusive, and may discharge the complaint, or if in his opinion it be well founded, may take a written undertaking, in a sum and with sureties to be approved by him, for the appearance of the clerk or apprentice at the next court of sessions of the county.

Id., § 49.

§ 938. **Proceedings thereon, and order of the court.** — Upon hearing the parties, the court may proceed as provided in section nine hundred and thirty-six, and may punish the clerk or apprentice, by fine or imprisonment, or both, as for a misdemeanor.

Id., § 50.

§ 939. **Indenture or contract of service, how assigned on death of master.** — Upon the death of a master to whom a person has been bound to service, as clerk, apprentice or servant, by the county superintendents of the poor, or by the overseers of

the poor, or in the city of New York, by the commissioners of charities and corrections, the personal representatives of the master may, with the written consent of the clerk, apprentice or servant, acknowledged before a justice of the peace or police justice, assign the indenture or contract of service to another, who thereby becomes vested with all the rights of the master.

Id., § 53.

§ 940. **Indenture or contract of service, how assigned on death of master.**— If, in the case mentioned in the last section, the written consent of the clerk, apprentice or servant be refused, the assignment may be made with the same effect, under an order of the court of sessions of the county, upon fourteen days' notice of the application therefor, to the apprentice, or to his parent or guardian, if there be any in the county.

Id., § 54.

TITLE X.

OF CRIMINAL STATISTICS.

SECTION 941. District attorney to furnish statement.

942. Duty of clerk.

943. Duty of clerk.

944. Duty of clerk.

945. Sheriff's report.

946. Sheriff's report.

947. Form of report.

948. Consequence of neglect.

949. Duty of secretary of state.

§ 941. **District attorney to furnish statement.**— Within ten days after the adjournment of any criminal court of record in this state, the district attorney of the county in which the court shall be held, must furnish to the clerk of the court such a description of the offense committed by every person convicted of crime, abridged from the indictment, as would be sufficient to maintain the averments relating to such offense, or necessary to be made in an indictment for a second offense.

3 R. S., 1084, §§ 6, 8, 16; Laws 1867, ch. 604, § 1.

§ 942. **Duty of clerk.**— Within twenty days after the adjournment of any criminal court of record, the clerk thereof must

transmit to the office of the secretary of state such statement furnished by the district attorney, of all convictions had at such court.

Id., §§ 7, 17.

§ 943. **Duty of clerk.** — Within twenty days after the adjournment of any criminal court of record, the clerk thereof must also transmit to the office of the secretary of state a duly certified statement of the number of indictments tried at such court, specifying the number for each separate offense, the number on which convictions were had, and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial.

Id., § 18; *Laws 1867*, ch. 604, § 2.

§ 944. **Duty of clerk.** — On or before the fifth day of every month, the clerk of each county must transmit to the secretary of state copies of all certificates of convictions made by any court of special sessions, and required by law to be filed with such clerk, and which have been filed in the office of the county clerk during the previous month.

Id., § 18; *Laws 1867*, ch. 604, § 3.

945. **Sheriff's report.** — A report must be made by the sheriff of every county in which there is a city, on the first day of every month to the secretary of state, of the number of persons convicted in city courts, courts of special sessions, and police courts during the preceding month. Such reports must specify the crimes, the whole number convicted, the sex, age, nativity, and whether married or single; the degree of education, religious instruction, whether parents living or dead, temperate or intemperate, and whether before convicted or not of any crime.

Id., § 20; *Laws 1867*, ch. 604, § 5.

§ 946. **Sheriff's report.** — Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall be held, must report to the secretary of state, the name, occupation, age, sex and native country of every person convicted at such court of any offense, and the degree of instruction which each person so convicted has received, and

also such other items of information in relation to such convicts and their offenses, as the secretary of state shall require.

Id., § 19; Laws 1867, ch. 604, § 4.

§ 947. Form of report. — The report required by this title must be made in the form prescribed by the secretary of state.

Id., § 19.

§ 948. Consequence of neglect. — For every neglect of magistrate, clerk or sheriff to comply with the requirements of this title, he forfeits the sum of fifty dollars, to be recovered in a civil action, in the name of the people of this state.

Id., § 23.

§ 949. Duty of secretary of state. — The secretary of state must cause this title to be published, with forms and instructions for the execution of the duties therein prescribed, and to be distributed among the officers therein mentioned; the expense of which must be paid by the treasurer, on the warrant of the comptroller. He must also annually report to the legislature the results of the information obtained in pursuance of this title.

Id., § 24.

TITLE XI.

MISCELLANEOUS PROVISIONS, RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

SECTION 950. Parties to a special proceeding, how designated.

951. Provisions respecting entitling affidavits, applicable.

952. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.

§ 950. Parties to a special proceeding, how designated. — The parties prosecuting a special proceeding of a criminal nature, is designated in this Code as the complainant, and the adverse party as the defendant.

New.

§ 951. Provisions respecting entitling affidavits, applicable. — The provisions of this Code, in respect to entitling

affidavits in a criminal action, are applicable to special proceedings of a criminal nature.

New.

§ 952. **Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.** — All courts and magistrates having before them special proceedings of a criminal nature, may issue subpoenas for witnesses, and punish their disobedience in the same manner as in criminal actions.

New.

GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO THIS CODE.

SECTION 953. Abatement of nuisance.

954. No part of this Code retroactive, unless expressly so declared.

955. Present tense includes future, etc.

956. Definition of "writing."

957. Definition of "oath."

958. Definition of "signature."

959. Definition of "magistrate."

960. Definition of "peace officer."

961. Definition of "court of sessions."

962. To what actions and proceedings this Code applies.

963. When Code to take effect.

§ 953. **Abatement of nuisance.**—Where a person is convicted of keeping or maintaining a public nuisance, and sentenced to punishment, the court may in its judgment, in addition to or in place of other punishment, direct that the nuisance be abated, and issue an order to the sheriff of the proper county to execute the judgment as therein directed.

New.

After conviction on indictment in cases of nuisance, the court is authorized to order that the nuisance be abated. (*Syracuse and Tully Plank R. Co. v. People*, 66 Barb., 26.)

§ 954. **No part of this Code retroactive, unless expressly so declared.**—No part of this Code is retroactive, unless expressly so declared.

New.

§ 955. **Present tense includes future, etc.**—Unless when otherwise provided, words used in this Code in the present tense, include the future as well as the present. Words used in the masculine gender comprehend as well the feminine and neuter. The singular number includes the plural, and the plural the singular. And the word "person" includes a corporation, as well as a natural person.

New.

§ 956. **Definition of "writing."**—The term "writing" includes printing.

New.

§ 957. **Definition of "oath."**—The term "oath" includes an affirmation.

New.

§ 958. **Definition of "signature."**—The term "signature" includes a mark, when the person cannot write; his name being written near it, and the mark being witnessed by a person who writes his own name as a witness, except to an affidavit or deposition, or a paper executed before a judicial officer; in which case the attestation of the officer is sufficient.

New.

§ 959. **Definition of "magistrate."**—Unless when otherwise provided, the term "magistrate" signifies any one of the magistrates mentioned in section one hundred and forty-seven.

New.

§ 960. **Definition of "peace officer."**—Unless when otherwise provided, the term "peace officer" signifies any one of the officers mentioned in section one hundred and fifty-four.

New.

§ 961. **Definition of "court of sessions."**—The term "court of sessions" includes "the court of general sessions in the city and county of New York," wherever such inclusion does not conflict with other provisions of this Code.

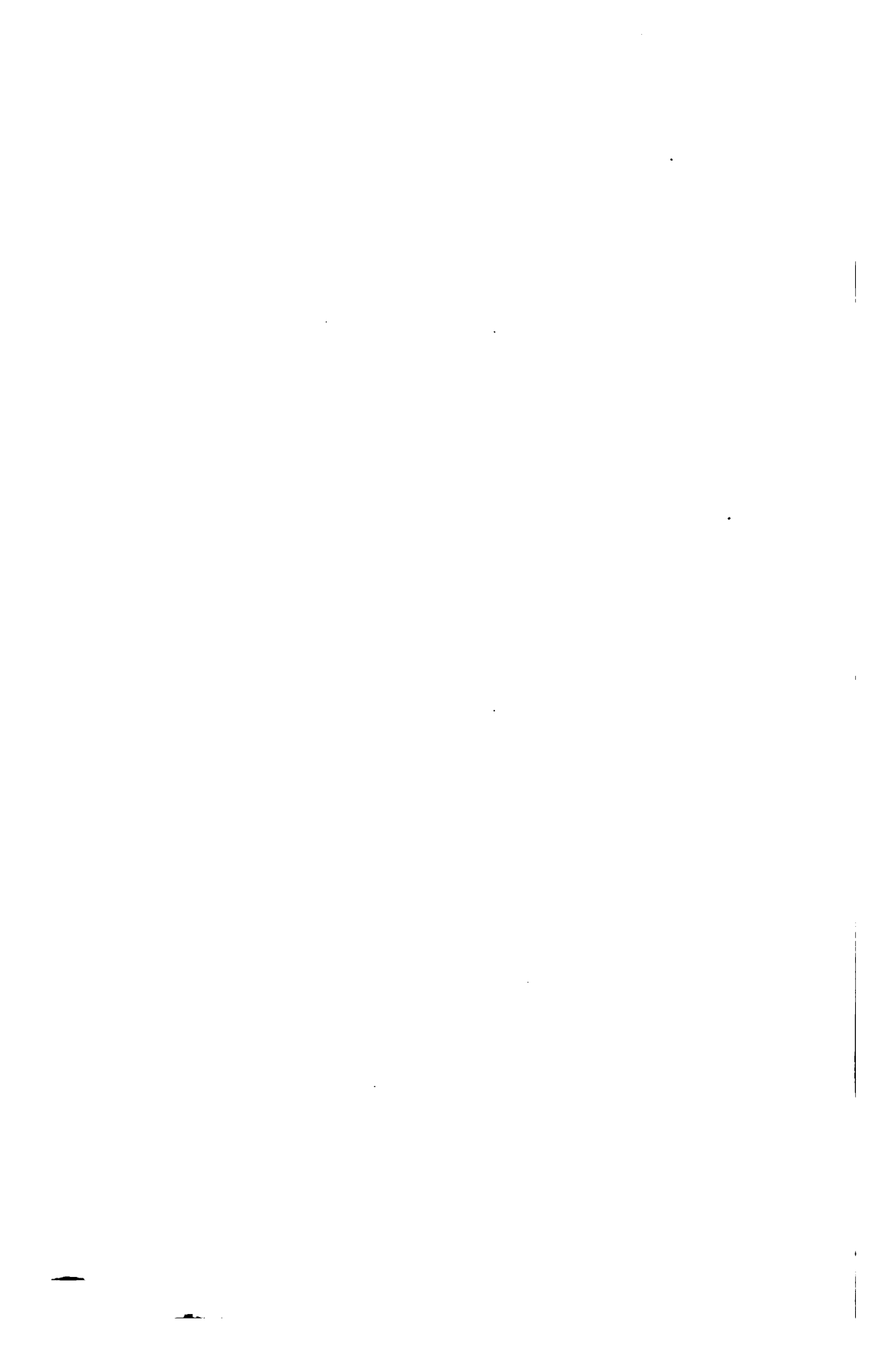
New.

§ 962. **To what actions and proceedings this Code applies.**—This Code applies to criminal actions, and to all other proceedings in criminal cases which are herein provided for, from the time when it takes effect; but all such actions and proceedings, theretofore commenced, must be conducted in the same manner as if this Code had not been passed; except that if in any local statute confined, by its terms, to a town or village or to a county or city other than the city and county of New York, any proceeding is prescribed, in addition to those prescribed by this Code and not inconsistent with it, the same shall remain unaffected by it.

New.

§ 963. **When Code to take effect.** — This Code shall take effect on the first day of September, eighteen hundred and eighty-one. When construed in connection with other statutes, it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

New.



FORMS

TO THE

CODE OF CRIMINAL PROCEDURE.

No. 1.

Notice of motion for the removal of an indictment from the Court of Sessions to the Court of Oyer and Terminer. (See Code Crim. Pro., §§ 22, 346.)

RENSSELAER COUNTY — COURT OF SESSIONS.

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

To.....District Attorney of.....county.

SIR.— Please to take notice that on the petition and affidavit of John Doe, hereto annexed, I will apply to the supreme court of the State of New York, at a special term thereof, to be held at the court-house in the city of, N. Y., on the 10th day of January, A. D. 1882, at eleven o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for a rule or order removing the indictment in the above entitled action, from the court of sessions of said county to the court of oyer and terminer, and for such other and further relief in the premises as may be just.

Yours, etc.,

SMITH & WELLINGTON,
Defendant's Attorneys.

No. 2.

Application for the removal of an indictment, before trial, from the Court of Sessions to the Court of Oyer and Terminer. (See Code of Crim. Pro., §§ 22, 346.)

To.....the supreme court of the State of New York:

The petition of John Doe respectfully shows, that at a stated term of the court of sessions, held in and for the county of Rensselaer in said State, on the first Monday of January, A. D. 1882, an indictment was duly presented by the grand jury of the body of the people of said county to said court, against your petitioner, wherein your petitioner was charged with having on the 10th day of December, 1881, at the city of Troy, N. Y., committed

the offense of arson in the first degree. That a certified copy of said indictment is hereto annexed. That your petitioner has been arrested upon a bench warrant issued upon the presentment and filing of said indictment in said court; and at the January term thereof was duly arraigned in open court and pleaded not guilty to said indictment by demanding a trial thereon. That thereupon said indictment was, by order of the said court of sessions, made at the said January term thereof, and on motion of the district attorney of said county, continued until the March term of said court; and that your petitioner thereupon, before the said court of sessions, gave recognizance, with good and sufficient sureties, to appear at the said March term of said court of sessions for his trial upon said indictment, and to do and receive what should by the said court be then and there enjoined upon him [state with particularity the facts and circumstances relied upon as a defense]. That your petitioner has fully and fairly stated the case to Messrs. Smith & Wellington, his counsel, who reside at Troy, N. Y., in said county of Rensselaer, and that he has a good and substantial defense upon the merits of said indictment, as he is informed by said counsel, after such statement made as aforesaid, and verily believes to be true [state facts and circumstances showing why a removal of the indictment becomes necessary], to wit, that upon the trial of said indictment intricate, novel and perplexing questions of law will arise, as he is advised by his said counsel after such statement made as aforesaid, which, together with the facts and circumstances constituting the defense of your petitioner to said indictment, and the facts and circumstances above set forth, renders the removal of the trial of said indictment from the said court of sessions to the next oyer and terminer, to be held in said county of Rensselaer, expedient and proper [or that your petitioner is anxious for a more speedy trial than can be obtained in the court of sessions]; or that, under section 343, one or more trials have been had in which no verdict was reached, and by reason of popular feeling or otherwise it is expedient to remove the cause to another county. [Of course the facts and circumstances that render a removal expedient and proper will depend upon the peculiarities of each individual case, and must be set forth with clearness and particularity].

And your petitioner will ever pray, etc.

Dated *March 1, 1882.*

JOHN DOE.

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss. :

John Doe, being duly sworn, says that he is the petitioner named in and who subscribed the foregoing application; that he has read the same, knows its contents, and that it is in all respects correct and true.

JOHN DOE.

Subscribed and sworn before }
me, March 1, 1882. }

GEO. R. DONNAN,

Com. of Deeds, Troy, N. Y.

No. 3.

Order on application removing indictment from Court of Sessions to Oyer and Terminer.

SUPREME COURT—RENSSELAER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

At a special term of the supreme court of the State of New York, held at the court-house, in the city of Troy, on the 10th day of January, A. D. 1882.

Present—Hon. C. R. INGALLS, *Justice Supreme Court.*

Upon reading and filing the foregoing application of John Doe, and a certified copy of the indictment against the same charging him with arson in the first degree, presented and filed at a court of sessions held in and for the county of Rensselaer, on the first Monday of January, A. D. 1882; and after hearing Smith & Wellington in support of said application, and La Motte W. Rhodes, district attorney of Rensselaer county, in opposition thereto, it is hereby ordered that said indictment be and is hereby removed from the court of sessions of the county of Rensselaer to the next court of oyer and terminer to be held in and for the said county of Rensselaer, and that the trial of the said John Doe be had in the last-mentioned court.

C. R. INGALLS,
Justice Sup. Court.

No. 4.

Recognizance to accompany order removing indictment when the defendant is not in confinement.

COURT OF OYER AND TERMINER.

THE PEOPLE, ETC.,
against
 JOHN DOE.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER.

Be it remembered that on this 10th day of January, A. D. 1882, John Doe, James Burke and Richard Roe, all of the city of Troy, county and state aforesaid, personally came before me, C. R. Ingalls, a justice of the supreme court of the State of New York, and each of them separately and by himself and for himself acknowledged himself to be indebted to the people of the State of New York in the sum of one thousand dollars if default be made in the following conditions:

Wherefore, upon the written application of the said John Doe, the above named justice of the supreme court, in pursuance of the provisions of the statute, has removed the indictment against the said John Doe, presented and filed in the court of sessions of the said county of Rensselaer, on the first Monday of January, A. D. 1882, for arson in the first degree, from the said

court of sessions to the next oyer and terminer, to be held in and for the county of Rensselaer; and directed the trial of the said John Doe on said indictment to be held in the said last mentioned court.

Now, therefore, the condition of this obligation is such that if the said John Doe personally appear at the next oyer and terminer to be held in and for the county of Rensselaer, at the court-house in the city of Troy, on the second Monday of May, 1882, and at such other time as such court shall appoint, and shall stand trial upon the issue joined, and shall not depart said court of oyer and terminer without leave, then this recognizance to be void, otherwise to abide in full force and effect.

JOHN DOE. [L. s.]
JOHN BURKE. [L. s.]
RICHARD ROE. [L. s.]

Taken and acknowledged before }
me, January 10, 1882. }

C. R. INGALLS,
Justice Supreme Court.

No. 5.

Affidavit to obtain order for stay. (§ 347.)

RENSSELAER COUNTY, ss.:

Albert Smith, of Troy, N. Y., being duly sworn, says that he is one of the attorneys for the John Doe, the prisoner under arrest, charged by indictment with the crime of arson [state with particularity the nature of the crime; also the facts and circumstances which render a removal necessary]; that the next term of the court of sessions will be held on the 9th of June, 1882, in and for the county of Rensselaer aforesaid, and that this deponent is about to make a motion for the removal of the said indictment from the said court of sessions to the court of oyer and terminer, and that there is not now time to move the court for such an order before the convening of the said court of sessions.

ALBERT SMITH.

Sworn before me, }
June 5, 1882. }

GEO. R. DONNAN,
Com. of Deeds, Troy, N. Y.

No. 6.

Order granting stay. (Code Crim. Proc., § 347.)

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

At a special term of the supreme court of the State of New York, held at the chambers of Hon., in the city of on the day of, 188..

Present—Hon., *Sup. Court Judge.*

On reading and filing the affidavit of Albert Smith, hereto annexed, and on motion of Smith & Wellington, attorneys for John Doe, it is hereby ordered that the trial, and all proceedings under the indictment of John Doe, be and are hereby staid until the determination of the application of said John Doe for an order removing said indictment, as set forth in said affidavit.

.....
Jus. Sup. Ct.

No. 7.

SURETY OF THE PEACE.

Information for the purpose of obtaining surety of the peace. (See Code Crim. Proc., § 84.)

COUNTY OF RENSSELAER, ss. :

Raymond Coon, of the city of Troy, county of Rensselaer and State of New York, upon his oath complains that John Doe, of the same place, has threatened to commit an offense against the person [or property] of this complainant, to wit, to kill, beat or maim, or commit an assault and battery upon this complainant, and to do him great bodily harm, and that this complainant has just cause to fear that the said John Doe will carry into effect the above threats [or that the said John Doe has threatened to burn, destroy or injure the property of this complainant, etc.].

The said Raymond Coon, therefore, prays that proper legal process may be issued, and that surety of the peace may be granted to him against the said John Doe; and this complainant hereby avers that he makes this complaint not from malice or ill-will toward the said John Doe, but simply because of the threats above set forth, and a belief that the said John Doe will carry said threats into effect to the bodily harm and injury of this complainant.

Wherefore, this complainant prays that a warrant may issue against the said John Doe, and that he be arrested thereupon, and that such other proceedings be had in the premises as are provided for in the statute.

RAYMOND COON.

The above-named complainant, Raymond Coon, on the 1st day of January, A. D. 1882, in the city, county and state aforesaid, personally came before me, and being duly sworn, made oath to the truth of the foregoing complaint by him subscribed.

R. C. JENYSS,
Police Justice.

No. 8.

Examination of the complainant and his witnesses upon the foregoing complaint.
(Code Crim. Proc., § 85.)

POLICE COURT (OR JUSTICES' COURT) OF THE CITY OF.....
(OR TOWN OF.....)

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

The examination of Raymond Coon and Jacob Saunders, taken on oath before me, R. C. Jenyss, police justice, Troy, N. Y., January 1st, A. D. 1882, upon the complaint of the said Raymond Coon, for the purpose of obtaining surety of the peace;

The said Raymond Coon being by me duly sworn says [here set forth with particularity the proof of the facts alleged in the complaint.]

And the said Jacob Saunders, being likewise by me duly sworn, says that he was present when the threats against the said Raymond Coon were made by the said John Doe, as alleged in his said complaint, and that such threats were as follows [here set forth with particularity the evidence tending to substantiate the facts alleged in the complaint.]

RAYMOND COON.
JACOB SAUNDERS.

Sworn to before me, }
January 1st, 1882. }

R. C. JENYSS,
Police Justice.

No. 9.

Warrant of arrest. (See Code Crim. Proc., § 86.)

POLICE COURT (OR JUSTICES' COURT) OF.....

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To the sheriff of said county, or to any constable, marshal or policeman of the city or town, GREETING:

Whereas, Raymond Coon, of the city of Troy, in said county of Rensselaer, did, on the 1st day of January, 1882, make complaint in writing and upon oath, before me, that John Doe, of the same place, did threaten to commit grievous offenses against the property [or person] of him, the said Raymond Coon [state the specific offense threatened with particularity], and has demanded surety of the peace against the said John Doe, and an examination on oath having been taken by me, R. C. Jenyss, police justice, Troy, N. Y., at Troy, N. Y., aforesaid, and it appearing from such examination that there is just cause to fear that said John Doe would carry his said threats into effect,

This is therefore to command you, in the name of the people of the State of New York, forthwith to arrest the said John Doe, and bring him before

me, at the police court, in the city of Troy, to be dealt with according to law.

Given under my hand at the city of Troy, county of Rensselaer and State of New York, January 1, 1882.

R. C. JENYSS,
Police Justice.

No. 10.

Recognizance to keep the peace. (See Code Crim. Proc., § 89.)

POLICE COURT (OR JUSTICES' COURT) OF.....

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

Be it remembered that at the city of Troy, in the county of Rensselaer aforesaid, on this 5th day of January, A. D. 1882, John Doe and John Carpenter, both of the city of Troy, in said county, personally came before me and severally acknowledged themselves to be indebted to the people of the State of New York in the sum of \$1,000, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the following condition:

The condition of this obligation is such, that if the above bounden John Doe personally appear at the next court of sessions to be held in and for the said county of Rensselaer, at the court-house in the city of Troy, in said county, and shall not depart the same without leave, and shall in the meantime keep the peace toward the people of the State and particularly towards Raymond Coon, then this recognizance to be void and of no effect, otherwise to remain in full force and virtue.

JOHN DOE. [L. s.]
JOHN CHRISTIE. [L. s.]

Subscribed and acknowledged before }
me, January 5, 1882. }

R. C. JENYSS,
Police Justice.

No. 11.

Warrant of commitment where the prisoner neglects or refuses to give surety.
(See Code Crim. Proc., § 90.)

[Title of Court.]

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable, etc., and to the keeper of the common jail of said county,
GREETING:

This is to command you, the said constable, forthwith to convey and deliver to the said keeper the body of John Doe, this day brought before me, and required by me to enter into a recognizance with one sufficient surety in

the sum of one thousand dollars for his personal appearance at the next court of sessions, to be held in and for the said county of Rensselaer, at the courthouse in the city of Troy, and not to depart the same without leave, and in the meantime to keep the peace towards the people of the State of New York, and particularly towards Raymond Coon, who has demanded surety of the peace against John Doe, before me by a complaint in writing and upon oath, the said John Doe having failed to find such surety.

And you, the said keeper, are required to receive the said John Doe into your custody in the said jail of your county, and him there safely keep until he shall find security as aforesaid, or be otherwise discharged by due course of law.

Given under my hand, at the city of Troy, New York, this 10th day of January, 1882.

R. C. JENYSS,
Police Justice.

No. 12.

A similar warrant when no complaint has been made by the party whose person or property is threatened, but where the offense was committed in the presence of the court or magistrate. (See Code Crim. Proc., § 93.)

[Title of Court, etc.]

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable, etc., of said county of Rensselaer, and to the keeper of the common jail, GREETING:

This is to command you, the said constable, forthwith to convey and deliver into the custody of the said keeper, the body of John Doe, charged by me with having, on this 1st day of January, A. D. 1882, at the city of Troy, N. Y., in my presence made an affray with one Raymond Coon [or having threatened to injure the person or property of said Raymond Coon], and the said John Doe having been then and there required by me without other proof to enter into a recognizance in the sum of \$1,000, with one sufficient surety, for his appearance at the next court of sessions, to be held in and for the said county of Rensselaer, at the city of Troy, N. Y., and not to depart the same without leave, and in the meantime to keep the peace toward the people of the State, and especially toward Raymond Coon, the said John Doe having refused to find security.

And you, the said keeper, are hereby required to receive the said John Doe into your custody in the said jail and him there safely keep until he shall find security as aforesaid, or be otherwise discharged by due course of law.

Given under my hand this 10th day of January, A. D. 1882, at Troy, N. Y.

R. C. JENYSS,
Police Justice.

No. 13.

Warrant to release a prisoner committed under either of the foregoing warrants, he having subsequently given the required security. (See Code Crim. Proc., § 91.)

[Title of court.]

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER, }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the keeper of the common jail of said county, GREETING :

This is to command you forthwith to release from your custody the body of John Doe, if detained by you for no other cause than that specified in the warrant of commitment by R. C. Jenyss, police justice of the city of Troy, N. Y., on the 1st day of January, A. D. 1883, for not finding sureties of the peace upon the complaint of Raymond Coon, he, the said John Doe, having since his said commitment found sureties before us; and for your so doing let this be your sufficient warrant.

Witness, R. C. Jenyss and John J. Hassett, police justices of the said city of Troy, Rensselaer county, N. Y., this 1st day of January, 1882.

R. C. JENYSS,

Police Justice.

JOHN J. HASSETT,

Police Justice.

No. 14.

Discharge for want of evidence. (See Code Crim. Proc., § 88.)

POLICE COURT (OR OTHER COURT) OF.....

THE PEOPLE
against
JOHN DOE.

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER, }

Whereas, It appearing that from the evidence and proofs submitted to me on the examination heretofore had herein, that there is not sufficient reason to fear the commission of the crime alleged in the complaint to have been threatened, I do hereby order the said John Doe to be discharged.

Dated, etc.

R. C. JENYSS,

Police Justice.

No. 15.

Return of names of aiders and abettors under the riot act. (Code Crim. Proc., § 104.)

To the Supreme Court of the State of New York:

I,, sheriff of
[or other officer], do hereby certify that pursuant to a process of this court, duly directed to me for execution on the day of June, 1882, at

Troy, N. Y., in the county of Rensselaer, I attempted to execute said process, but that John Doe, the defendant named in said process, aided and abetted by

 all of the city of Troy, N. Y., did forcibly resist and prevent the legal execution of said process.

All of which is respectfully submitted.

Dated, etc.

JAMES INGRAM,

Sheriff Rens. Co.

No. 16.

Information for warrant—General form. (See Code Crim. Proc., § 145.)

To, one of the justices of the peace [or police justices] in and for the county of Rensselaer [or city of, as the case may be]:

James Dunn, of the town of Grafton, of said county, being duly sworn, says that on the 10th day of June, 1882, at the town of Grafton aforesaid, in said county, John Doe, late of the city of Troy, in said county of Rensselaer, did [here state with particularity the offense charged]. He therefore prays that legal process may be issued, and that the said John Doe be apprehended and held to answer to said complaint, and be dealt with according to law.

Dated at Grafton, in the county of Rensselaer, this 12th day of June, A. D. 1882.

JAMES DUNN.

Subscribed and sworn before me, }
 this 12th day of June, 1882. }

HENRY BURROUGHS,
Justice of the Peace.

No. 17.

Warrant of arrest—General form. (See Code Crim. Proc., § 151.)

STATE OF NEW YORK, }
 COUNTY OF RENSSELAER [OR OTHER COUNTY]. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in this State [or in the county of Rensselaer, as the case may be, as provided in sections 155 and 156]:

Information on oath having this day, by information, been laid before me that the crime of [designating it] has been committed and accusing John Doe thereof.

You are, therefore, commanded forthwith to arrest the said John Doe, and bring him before me, at the police court [or other court], in the city of Troy, N. Y., or in case of my absence or inability to act before the nearest or most accessible magistrate in this county.

Dated at the city of Troy, this 10th day of June, 1882.

R. C. JENYSS,
Police Justice (or justice of the peace, as the case may be).

No. 18.

Affidavit showing handwriting of justice. (Code Crim. Proc., § 157.)

POLICE COURT (OR OTHER COURT).

THE PEOPLE
against
JOHN DOE.

}

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER.

James Connors, being duly sworn, says that he is acquainted with the handwriting of, the justice who issued the annexed warrant, and that he knows the signature thereto attached to be the genuine signature of said and that the said warrant was issued and signed by said in his presence.

JAMES CONNORS.

Sworn before me, }
June 10, 1882. }

JAMES DUFFY,
Justice of the Peace.

No. 19.

Indorsement upon warrant where the defendant is to be arrested in another county
(See Code Crim. Proc., § 157.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER.

Due proof upon oath having been made before me, one of the justices of Rensselaer county, that the name of, purporting to be signed to the warrant of arrest in the handwriting of the said, the justice of the peace in the said warrant named, I do hereby authorize and direct any officer to whom the said warrant is directed to execute the same within the said county of

Dated June 10, 1882.

JAMES DUFFY,
Justice of the Peace, Albany County, N. Y.

No. 20.

Return to warrant of arrest.

I have arrested the within-named defendant, and have him here in my custody as within commanded.

Dated, etc.

GEORGE BROWN,
Constable.

No. 21.

Return where all the defendants cannot be found.

I have arrested the within John Smith and William Marks, and have them here in my custody, but the within-named James Cranch cannot be found.

Dated, etc.

GEORGE BROWN,

Constable.

No. 22.

Return where the magistrate issuing the warrant is absent (See Code Crim. Proc., §§ 164 and 166.)

As within commanded, I have arrested the within-named defendant, and I hereby return that on making the arrest I forthwith brought the said defendant to the office of the magistrate who issued the warrant, but that the said magistrate was absent therefrom.

Dated, etc.

GEORGE BROWN,

Constable.

No. 23.

Return when the magistrate issuing the warrant has gone out of office.

I hereby certify that I have arrested the within named defendant, and that at the time of such arrest, Charles Homer, the magistrate issuing the warrant, had ceased to be such magistrate by the expiration of his term of office [or otherwise].

Dated, etc.

GEORGE BROWN,

Constable.

No. 24.

Warrant after prisoner has escaped or been rescued. (See Code Crim. Proc., § 828.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER, }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, etc. [as in No. 15.]

Information upon oath having been this day laid before me by Michael Wallace, a constable of this county, to whom a warrant had heretofore been issued for the arrest of John Doe, that he had arrested the said John Doe by virtue thereof, and that the said John Doe had afterwards at the city of Troy, in said county of Rensselaer, on the tenth day of June, escaped [or been rescued] from the custody of said Wallace. You are, therefore, again commanded to forthwith apprehend the said John Doe, and bring him before me at my office in the village of Lansingburgh, in said county of Rensselaer aforesaid, to be dealt with according to law, or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated, etc.

R. B. STILES,
Justice of the Peace.

No. 25.

Warrant for the arrest of a fugitive from another State. (Code Crim. Proc., §§ 827, 828.)

[Formal part as in No. 15.]

Information upon oath having been this day laid before me by James Burke that John Doe had committed murder in the State of Vermont on the 10th day of June, 1882, and is now a fugitive from justice in the county of Rensselaer in this state,

You are therefore commanded forthwith to arrest the above-named John Doe and bring him before me at my office in the village of Lansingburgh, N. Y., or in the case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated, etc.

R. B. STILES,
Jus. of the Peace

No. 26.

Form of commitment of fugitive, etc. (See Code Crim. Proc., § 829.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

The within-named John Doe having been brought before me under this warrant, and it appearing to me that from an examination by me had, that he is guilty of the crime charged, and that he is a fugitive from justice as therein set forth, I therefore commit the said John Doe to the sheriff of the county of Rensselaer [or to the keeper of the common jail] for the space of thirty days [or other reasonable time], or until he shall be discharged by due course of law.

Dated, etc.

R. B. STILES,
Justice of the Peace

No. 27.

Notice to district attorney of commitment of a fugitive from justice. (See Code Crim. Proc., § 832.)

TO LA MOTTE W. RHODES, *district-attorney of Rensselaer county*:

SIR.—Please to take notice that I have this day committed John Doe, a fugitive from justice from the State of Vermont, charged with the crime of murder, committed in said state of Vermont, to the sheriff of Rensselaer county to await the action of the authorities of the State of Vermont aforesaid.

Dated, etc.

Yours, etc.,

R. B. STILES,
Committing Magistrate.

No. 28.

Notice to the governor, etc., of the State having jurisdiction of the fugitives.

(Code Crim. Proc., § 833.)

To Hon., *Governor of the State of Vermont:*

SIR.—The sheriff of Rensselaer county, State of New York, has in charge and subject to your action one John Doe, charged with murder committed within your State on the 10th day of June, 1882. Awaiting your motion, I remain,

Very respectfully yours,

LA MOTTE W. RHODES,

Dist. Atty. of Rens. Co., N. Y.

No. 29.

POLICE COURT (OR OTHER COURT).

Commitment for examination. (Code Crim. Proc., § 198.)

THE PEOPLE
against
JOHN DOE.

}

The within named John Doe having been brought before me under the within warrant, is committed for examination to the sheriff of the county of Rensselaer, or in the city and county of New York, to the keeper of the city prison of the city of New York.

Dated, etc.

.....
Jus. of the Peace.

No. 30.

Entry informing prisoner of his right to make a statement. (Code Crim. Proc., § 197.)

At the close of the examination of the witnesses on the part of the people, the defendant was informed of his right to make a statement in relation to the charge against him, as required by section 196 of the Code of Criminal Procedure, and after being so informed he did expressly waive his right to make the same.

.....
Police Justice (or Justice of the Peace).

No. 31.

Statement of defendant—General form. (Code Crim. Proc., § 198.)

Question. What is your name and age? *Answer*.....

Question. Where were you born? *Answer*.....

Question. Where do you reside and how long have you resided there?

Answer.....

Question. What is your business or profession ? *Answer*.....

Question. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation? *Answer.*

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 32.

Authentication of statement. (Code of Crim. Proc., § 200.)

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss..

I, R. B. Stiles, a justice of the peace of the county of Rensselaer, do hereby certify that at the close of the examination before me of the witnesses on the part of the people in the above action, I informed the defendant that it was his right to make a statement in relation to the charge against him, and the nature of the charge was stated to him ; that the statement was designed to enable him, if he saw fit, to answer the charge, and to explain the facts alleged against him ; that he was at liberty to waive making a statement, and that his waiver could not be used against him on the trial ; that after being so informed, he made the following statement :

[Here insert questions and answers, as in No. 31.]

That at the close of said statement, I requested said defendant to sign the same, which he refused to do, giving as reasons for such refusal the following, to wit :

[Insert reasons for declining, etc.]

Dated LANESBURGH, N. Y., June 10, 1883.

R. B. STILES,
Justice of the Peace.

No. 33.

Entry of waiver by Justice. (Code Crim. Proc., § 201.)

After the waiver of the defendant to make a statement, the following witnesses were produced, sworn and examined by and on behalf of the defendant

[Insert proceedings had].

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 34.

Testimony, how taken and authenticated. (Code Crim. Proc. § 204.)

JUSTICES' COURT (OR POLICE COURT).

THE PEOPLE
against
JOHN DOE.

}

Before Justice....., June 10, 1882, Rensselaer county,
N. Y.

....., being duly sworn, deposes and says :

Question. What is your name and age ? *Answer*.....

Question. Where do you reside ? *Answer*.....

Question. What is your business or profession ? *Answer*.....

[Insert evidence taken.]

I, R. B. Stiles, justice of the peace, Lansingburgh, N. Y., in said county,
do hereby certify that the above is the testimony given by
a witness sworn on the part of the defendant, who stated his name to be
..... his age to be
his business or profession to be.....

Dated, etc.

.....,

Justice of the Peace (or Police Justice).

No. 35.

Indorsement for discharge of prisoner in court. (Code Crim. Proc., § 207.)

Having duly examined witnesses and considered the evidence against the
defendant, John Doe, and there being no sufficient cause to believe him guilty
of the offense charged; I order him to be discharged.

Dated, etc.

.....,

Justice of the Peace (or Police Justice).

No. 36.

Order of discharge when defendant is in jail. (Code Crim. Proc., § 207.)

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, } ss. :
RENSSELAER COUNTY.

To the keeper of the common jail of Rensselaer county :

You are hereby required, on the receipt of this, to discharge from your
custody John Doe, who was committed to jail by me, R. B. Stiles, justice of
the peace of Rensselaer county, charged with the offense of [set out in the
charge].

Dated, etc.

.....,

Justice of the Peace (or Police Justice).

No. 37.

Order to commit. (Code Crim. Proc., § 208.)

It appearing to me by the within depositions [and statement if any] that the defendant, John Doe, is guilty of the offense charged, I hereby order that he be held to answer the same.

Dated, etc.

.....
Justice of the Peace.

No. 38.

Order for commitment without bail. (Code Crim. Proc., § 209.)

[Add to No. 28.] And that he be committed to the sheriff of the county of Rensselaer [or in the city and county of New York, to the keeper of the city prison of the city of New York].

Dated, etc.

.....
Justice, etc.

No. 39.

Certificate of bail. (Code Crim. Proc., § 210.)

[Add to No. 37.] And I have admitted him to bail, to answer by the undertaking hereto annexed [or if bail has not been taken], and that he be admitted to bail in the sum of two thousand dollars [or other sum], and be committed to the sheriff of Rensselaer county [or in the city and county of New York, to the keeper of the city prison of the city of New York], until such bail be given.

Dated, etc.

.....
Jus. of the Peace

No. 40.

Indorsement to be made on statement and deposition of defendant in case of prisoner's discharge. (Code Crim. Proc., § 207.)

There being no sufficient cause to believe the within named.....
.....guilty of the offense within mentioned, I order him discharged.

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 41.

Indorsement to be made on deposition and statement of defendant, if crime be bailable and defendant admitted to bail, but bail has not been taken. (Code Crim. Proc., §§ 208, 212.)

It appearing to me by the within depositions and statement, that the crime therein mentioned of arson, has been committed, and that there is sufficient

cause to believe the within-named.....
to be guilty thereof, I order that he be held to answer the same, and that he
be admitted to bail in the sum of.....dollars, and be committed
to the sheriff of the county of Rensselaer, until he give such bail.

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 42.

*Indorsement to be made on deposition and statement of defendant if believed
guilty. (Code Crim. Proc., §§ 208, 209.)*

It appearing to me by the within depositions and statement that the crime
therein mentioned has been committed, and that there is sufficient cause to
believe the within-named.....guilty thereof, and
I hereby order that he be held to answer the same.

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 43.

*Indorsement to be made on depositions and statement of defendant, if crime be bail-
able and bail be taken. (Code Crim. Proc., §§ 208, 210.)*

It appearing to me by the within depositions and statement that the crime
therein mentioned of has been committed, and that
there is sufficient cause to believe the within named.....to be
guilty thereof, I order that he be held to answer the same, and I have
admitted him to bail by the annexed undertaking.

Dated.....

.....
Police Justice (or Justice of the Peace).

No. 44.

*Indorsement to be made on defendant's deposition and statement, if believed guilty
and crime be not bailable. (Code Crim. Proc., §§ 208, 209.)*

It appearing to me by the within depositions and statement that the crime of
murder has been committed, and that there is sufficient cause to believe the
within named to be guilty thereof, I do hereby order
that he be held to answer the same, and that he be committed to the sheriff of
the county of Rensselaer.

Dated.....

.....
Police Justice (or Justice of the Peace).

No. 45.

Commitment for further examination.

POLICE COURT (OR JUSTICES' COURT).

The sheriff of Rensselaer county will receive and safely keep within the common jail of said county for further examination..... charged before me with the offense of [set forth briefly the offense].

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 46.

Undertaking to appear before magistrate issuing warrant taken in another county.
(Code Crim. Proc., § 159.)

STATE OF NEW YORK, }
COUNTY OF..... } ss. :

We,.....of.....in the county of.....by occupation a....., defendant, and.....of.....in the county of.....by occupation a.....and.....of.....in the county of.....by occupation a.....sureties, acknowledge ourselves to owe the people of the State of New York each the sum of.....dollars, to be made and levied out of our respective goods and chattels, lands, tenements, to the use of the said people if default shall be made on the conditions following :

The condition of this recognizance is that, whereas, information has been made on oath, before.....one of the justices of the peace [or police justices] of the county of Rensselaer, that on the.....day of.....1882, in said county, the crime of.....was committed, and accusing.....thereof ;

And, whereas, the said....., justice of the peace [or other justice] as aforesaid, did, on the.....day of....., 1882, duly issue a warrant for the arrest of said.....;

And, whereas, the said.....has been duly arrested in the county of Saratoga, and having required the officer making the arrest to take him before a magistrate in the said county of Saratoga, he has this day been duly brought before me, the undersigned, one of the justices of the peace of said county of Saratoga ;

Now, therefore, if the said.....shall personally appear before the said....., justice of the peace [or police justice] aforesaid, at his office [or police court-room] in the city of....., county of....., on the.....day of....., 1882, at.....o'clock, A. M., on that day, then this recognizance to be void, otherwise to remain in full force and effect, and we, the said sureties, will pay to the people of the State of New York the sum of.....

(Signed)

Taken and subscribed before me, }
this.....day of..... }

.....
Justice of the Peace.

STATE OF NEW YORK, } ss. :
 COUNTY OF, }

..... of said county, being duly sworn, doth depose and say that he is worth dollars, over and above all debts, dues, demands and liabilities whatever, and that his property consists of

Subscribed and sworn before me, }
 this....day of.....1882. }

.....
Justice of the Peace (or other Justice).

STATE OF NEW YORK, } ss. :
 COUNTY OF, }

..... of, in said county, being duly sworn, doth depose and say that he is worth dollars, over and above all debts, dues, demands and liabilities whatever, and that his property consists of

Subscribed and sworn before me, }
 this....day of.....1882. }

.....
Justice of the Peace.

No. 47.

Bond for adjournment. (Code Crim. Proc., § 192.)

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
 COUNTY, }

We,, of No. street, a holder, and of No. street, a holder, residents of the city of, in said county, acknowledge ourselves to be indebted to and owe the people of the State of New York each the sum of hundred dollars, to be respectively made and levied of our several goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that whereas, information has been made on oath before, one of the justices of the peace [or other justice] of the county of [or city of] Rensselaer, that the offense of has been committed, and accusing said thereof, and said has been duly arrested and held for examination.

Now, therefore, if the said shall personally appear before justice as aforesaid, at his office [or police court] in the city [or town of] on the day of 1882, at ten o'clock A. M. of that day, to be examined for the offense afore-

said; and to do and receive what shall by the said justice be then and there enjoined upon him; and shall appear during such examination, and shall not depart the said court without leave, then this recognizance to be void, otherwise, we, the said bail, will pay the people of the State of New York the said sum of dollars.

Taken, subscribed and acknowledged }
before me, this....day of 1882. }

Justice of the Peace (or other Justice).

[Affidavits of sureties as in No. 46.]

No. 48.

Undertaking to grand jury in cases triable by special sessions. (Code Crim. Proc., § 211.)

..... COUNTY, }
JUSTICES' COURT [OR OTHER COURT], } ss.:

.....having been duly charged on information before.....a justice of the peace of the town of..... county of, with the offense of.....and the said justice having informed him of his right to be tried by a jury after indictment, and did ask him how he would be tried, and he requiring to be tried by a jury after indictment; and after having so required to be tried the said justice did hold said..... to answer to the next court to be held in and for the said county of, having authority to inquire by the intervention of a grand jury into offenses triable in said county of

We,..... of.....in the.....of..... by occupation a.....and.....of.....in the..... of.....by occupation a.....and.....of..... in the.....of.....by occupation a.....undertake that said.....shall appear and answer the charge above mentioned at the next court, to be held in and for the county of, having authority to inquire, by the intervention of a grand jury, into offenses triable in the said county of, and shall at all times render himself amenable to the process of the court; and if convicted, shall appear for judgment, and render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the people of the State of New York the sum ofhundred dollars.

Dated the.....day of....., 1882.

(Signed)

Taken, subscribed and acknowledged before me, }
the day and year last above mentioned. }

Justice of the Peace (or other Justice).

[Affidavits of sureties as in No. 46, ante.]

No. 50.

Form of commitment. (Code Crim. Proc., § 214.)

COUNTY OF RENSSELAER, ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

*To the sheriff of the county of Rensselaer [or in the city and county of New York
"to the keeper of the city prison of the city of New York"]:*

An order having been this day made by me that John Doe be held to answer to the court of upon a charge of [state the nature of the crime], you are commanded to receive him into your custody, and detain him until he be legally discharged.

Dated, etc.

.....
Justice of the Peace.

No. 51.

Undertaking of witness to appear without sureties. (Code Crim. Proc., § 215.)

Know all men by these presents, that I, John Doe, am held and firmly bound unto the people of the State of New York, in the sum of dollars, to be paid to the people of the State of New York; for which payment, well and truly to be made, I bind myself, my heirs, executors, administrators and assigns, jointly and severally by these presents.

Dated this day of, 1882.

The condition of this obligation is such that if the above-named John Doe shall duly appear as a witness when properly summoned, on the trial of a certain action, wherein the people of the State of New York are plaintiffs, and is defendant, on a charge of arson, and shall give his evidence therein on behalf of the said people, then this obligation shall be void and of no effect, otherwise to remain in full force and effect, and the said John Doe will pay to the people of the State of New York the said sum of one hundred dollars.

JOHN DOE.

STATE OF NEW YORK, }
COUNTY OF } ss.:

On this day of, in the year one thousand eight hundred and, before me, the subscriber, personally came to me known to be the person described in and who executed the within instrument, and acknowledged that he executed the same.

.....
Justice of the Peace.

No. 52.

Security for appearance of witness. (Code of Crim. Proc., § 216.)

JUSTICES' COURT (OR OTHER COURT).

THE PEOPLE <i>against</i> JOHN DORING.	}
----------------------------------------------	---

STATE OF NEW YORK, } ss. :
 RENSSELAER COUNTY.

The above named defendant having been arrested charged with the crime of arson, and having been held to answer on the deposition and evidence of John Doe, before Justice R. B. Stiles of Lansingburgh, N. Y., and the said justice being satisfied by proof on oath, that said John Doe intends to depart the State and not to appear and testify at the trial of this cause, and the said justice having required an undertaking with sureties, for his appearance at such trial:

Be it remembered, that on this.....day of.....188 ;
of.....in the county
by occupation a....., and.....
 of..... in the county of.....by occupation a.....,
 and.....of.....in the county
 of.....by occupation a.....sureties, personally came
 before me.....justice of the peace of the county of
 Rensselaer, and acknowledged himself, each, to be indebted to the people of
 the State of New York, in the sum of.....hundred dollars, to be made
 and levied of his goods and chattels, lands and tenements, to the use of the
 said people, if default shall be made in the condition following:

The condition of this recognizance is such that if the bounden.....
shall personally appear and testify
 at the next court.....
 to be held in and for the said city or county of to give evidence as a
 witness on behalf of the said people, against.....
 arrested and held to answer the charge of.....

 as well to the grand jury as to the petit jury, and do not depart the said court
 without leave, then this recognizance to be void and of no effect; otherwise
 to remain in full force and virtue. The said sureties will pay to the people of
 the State of New York, the said sum of.....hundred dollars.

Dated.....day of....., 188 .

(Signed)

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

On this day of, 18.., before me, the subscriber,
 personally appeared.....
 to me known to be the same persons described in and who executed the above
 undertaking, and severally acknowledged that they executed the same.

.....
Justice of the Peace.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

..... and
 being severally sworn, each for himself says, the said.....
 that he is a..... of the county of..... in this State, and
 that he is worth the sum of..... dollars over and above
 all debts and liabilities which he owes or has incurred, exclusive of property
 exempt by law from levy and sale under an execution; and the said.....
 for himself, says that he is a..... of the county
 of..... in this State, and that he is worth the sum of.....
 dollars over and above all debts and liabilities which he owes or
 has incurred, exclusive of property exempt by law from levy and sale under
 an execution.

Severally subscribed and sworn to, before me, }
 this..... day of..... 18.. }

Justice of the Peace.

I certify that I find the sureties in the foregoing undertaking sufficient, and
 do approve of the same.

Justice of the Peace.

No. 53.

Order that witness give security for appearance. (Code Crim Proc., § 216.)

JUSTICES' COURT (OR OTHER COURT).

THE PEOPLE
 against

Whereas, a witness examined before me, on the part of
 the people, in the above action, is a material witness for the people therein;

And, whereas, I am satisfied, by proof on oath, that there is reason to
 believe that the said..... will not appear and testify on the
 part of the people, at the next court of..... to be held in and
 for the county of..... on the..... day of..... 1882,
 to which the statements and depositions in the above action are to be sent, I
 do hereby order that the said..... enter into a written under-
 taking in the sum of..... with..... sureties that he will
 appear and testify on the part of the people at said next term of the court.

(Signed by justice.)

Dated, etc.

No. 54.

Commitment of witness who has refused to give an undertaking to appear and testify. (Code Crim. Proc., § 218.)

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff of the county of (or to the keeper of the city prison in the city and county of New York).

Whereas, It is made to appear to me, R. B. Stiles, a justice of the peace of Lansingburgh, N. Y., on the oath of good and sufficient witnesses, that John Doe is a material witness in a matter wherein James Doring is accused by the people of the State of New York of the crime of arson [state facts and circumstances], and that the said John Doe is about to leave the State, as he is satisfied by due proof on oath, to avoid being called as a witness on the part of the people therein;

And, whereas, The said John Doe refuses, as required by me, to enter into an undertaking in the sum of one hundred dollars, for his personal appearance at court, when duly subpoenaed to give evidence on behalf of the people against said James Doring,

You are therefore commanded to receive the said John Doe, and detain him in your custody until he shall give the security required, or be otherwise legally discharged.

Dated, etc.

R. B. STILES,
Justice of the Peace, Lansingburgh, N. Y.

No. 55.

Warrant of commitment when witness refuses to furnish sureties. (Code Crim. Proc., § 218.)

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff, etc. [as in No. 53].

Whereas, It has been made to appear on the oath of good and sufficient witnesses that John Doe is a material witness in a matter wherein the people of the State of New York are plaintiffs, and James Doring, the defendant, is accused by the said plaintiffs of the crime of arson [state facts and circumstances], and that the said John Doe is about to leave the State to avoid giving his testimony at the trial thereof, at the instance of the said people, and whereof the said John Doe refuses, as required by me, to give security, as fixed by me, for his appearance at the trial of the said cause when duly subpoenaed. Now you are hereby commanded to receive the said John Doe into your cus-

today, and detain him until he gives the required security, or is otherwise legally discharged.

Dated, etc.

R. B. STILES,

Justice of the Peace, Lansingburgh, N. Y.

No. 56.

Oath of foreman of grand jury. (Code of Crim. Proc., § 245.)

You, as foreman of this grand jury, shall diligently inquire, and a true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this State, your fellows and your own you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave anyone unpresented through fear, favor, affection or reward, or hope of thereof, but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God!

No. 57.

Oath of grand jurors. (Code Crim. Proc., § 246.)

"The same oath which your foreman has now taken before you, on his part, you and each of you shall well and truly observe on your part. So help you God!"

No. 58.

Order to draw grand jury. (Code Crim. Proc., § 227.)

IN THE MATTER OF DRAWING GRAND
JURORS, ETC.

At a special term of the supreme court, held at the chambers of Hon.
.....in the city of....., on the.....

Present — Hon. Court.

To all whom it may concern:

It is hereby ordered that the clerk of Albany draw according to law a grand jury to serve at the next court of sessions of Rensselaer county, to be held at the court-house on the 25th day of June, 1882.

Dated June 1, 1882.

.....
.....

Order of board of supervisors to draw grand jury. (Code Crim. Proc., § 227.)

At a regular meeting of the board of supervisors of Rensselaer county, held in the city of Troy on the 1st day of June, 1882, it was, by unanimous consent, *Resolved*, That....., the clerk of Rensselaer, be and he is hereby ordered to draw, according to law, a grand jury to serve at the next court of sessions of Rensselaer county, to be held at the court-house in the city of Troy, on theday of June, 1882.

Dated *June*, 1882.

Chairman of Board of Supervisors, Rensselaer County.

Indorsement of clerk upon copy of order for drawing grand jury. (Code Crim. Proc., § 227).

I,, clerk of the board of supervisors of Rensselaer county, hereby certify that the within is a faithful copy of an order issued by the board of supervisors, passed June 1, 1882, and the whole thereof.

Clerk of Board, etc.

General form of indictment. (Code Crim. Proc., § 276.)

COURT OF (AS THE CASE MAY BE).

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

The grand jury of the county of Rensselaer [or of the city or city and county in which the indictment is found], by this indictment accuse John Doe of the crime of [here insert the name of the crime, if it have one, otherwise give a brief description as given by statute], committed as follows:

The said John Doe, on the 10th day of June, 1883, at the town [city or village] of Lansingburgh, in this county [here set forth with particularity the act charged as an offense].

District Attorney of county.

Bench warrant. (Code Crim. Proc., § 801.)

COUNTY OF RENSSELAER (OR OTHER COUNTY), ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in this State :

An indictment having been found on the 10th day of June, 1882, in the court of oyer and terminer [or other case], charging John Doe with the crime of [here describe the crime generally].

You are therefore commanded forthwith to arrest the above named John Doe and bring him before that court [or if the indictment has been removed, before the court to which it is removed] to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of Rensselaer [or as the case may be].

City [or town] of, the day of 1882.

By order of the court.

.....
Clerk.

No. 63.

Bench warrant in cases of misdemeanors. (Code Crim. Proc., § 302.)

[Insert in the body of No. 89.] "Or if he require it, that you take him before any magistrate in that county or in the county in which you arrest him, that he may give bail to answer the indictment."

No. 64.

Indorsement on warrant in a bailable case. (Code Crim. Proc., § 303.)

The defendant herein is to be admitted to bail in the sum of..... dollars.

By order of the court.

.....
Clerk.

No. 65.

Indorsement of taking bail on bench warrant. (Code Crim. Proc., § 303.)

Whereas, It appears from the within bench warrant that the crime is bailable, now it is hereby ordered by the court that the defendant be admitted to bail in the sum of...dollars.

.....
Clerk.

No. 66.

Affidavit to set aside indictment. (Code Crim. Proc., § 318.)

COURT OF OYER AND TERMINER.

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

Jacob Hart, being duly sworn, says that he is the attorney for the above named defendant, and that he has examined the indictment presented to this court by the grand jury at the present term, charging the said defendant with

the crime of arson; that said indictment, when returned to this court, was indorsed "a true bill," but was not signed by the foreman of the grand jury as required by section 268 of the Code of Criminal Procedure. Deponent further says that, the district attorney of this county, was present in the room at the time when the members of said grand jury were giving their votes on said indictment.

JACOB HART.

Sworn before me, }
June 10, 1883. }

GEORGE A. MOSHER,
Commissioner of Deeds, Troy, N. Y.

No. 67.

Order setting aside indictment. (Code of Crim. Proc., § 817.)

COURT OF OYER AND TERMINER.

PEOPLE OF STATE OF NEW YORK
against
JOHN DOE.

At a special term of the supreme court of the State of New York, held, etc.
On reading and filing the affidavit of James Hart, in support of a motion to set aside the indictment in the above entitled action, and after hearing said Hart in support of said motion, and Hon., district attorney of county, opposed thereto, and it appearing that the irregularities set forth in said affidavit are true, it is hereby ordered that said indictment be and the same is hereby set aside, and that said defendant be discharged from custody and his bail be exonerated [or that the case be again submitted to the grand jury for consideration].

By order of the court.

Dated, etc.

.....
Clerk.

No. 68.

Order of discharge if new indictment is not found by next grand jury. (Code Crim. Proc., § 819.)

[Formal part as in No. 43.]

It appearing to the satisfaction of the court that the indictment of John Doe was set aside at the last term of this court, and the present grand jury having been discharged without finding a new indictment against said John Doe, now on motion of James Hart, his attorney, it is hereby ordered that he be discharged from custody and his bail be exonerated.

By order of the court.

Dated, etc.

.....
Clerk.

No. 69.

Demurrer to indictment. (Code Crim. Proc., § 834.)

COURT OF OYER AND TERMINER — COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

The defendant John Doe, above named, demurs to the indictment presented by the last grand jury, on the 10th day of June, 1883, charging him with the crime of arson, on the following grounds:

First. That the crime set forth in the indictment was committed in the county of Albany, and was not within the jurisdiction of this court.

Second. The facts stated in said indictment do not constitute a crime.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in the said indictment.

Dated, etc.

CHARLES H. MILLS,

Attorney for Defendant.

No. 70.

Answer to demurrer

COURT OF OYER AND TERMINER — COUNTY OF

THE PEOPLE
against
 JOHN DOE.

....., who prosecutes for the people, says that the said indictment and the matter therein contained in manner and form, as the same are there stated, are sufficient in law to compel the said John Doe to plead to the same; wherefore the said people as the judgment of the court herein, that the said defendant be ordered to plead to said indictment, and proceed to trial under the same.

.....
District Attorney, of County

No. 71.

Plea of guilty. (Code Crim. Proc., § 834.)

COURT OF OYER AND TERMINER — COUNTY.

THE PEOPLE
against
 JOHN DOE.

The defendant herein, being duly arraigned, pleads that he is guilty of the crime charged in the indictment.

No. 72.*Plea of guilty of lesser crime.*

[Formal part as in No. 69.] The defendant on being arraigned on the indictment charging him with an assault with intent to kill, pleads guilty of the crime of a simple assault.

No. 73.*Plea of not guilty.*

[Formal part as in No. 69.] The defendant, on being arraigned, pleads not guilty to the crime charged in the indictment.

No. 74.*Plea of former conviction or acquittal.*

[Formal part as in No. 69.] The defendant herein, on being arraigned, pleads that he has already been acquitted [or convicted] of the crime charged in this indictment by the judgment of the court of special sessions [or other court], rendered at Troy, N. Y., on the 10th day of June, 1883.

No. 75.*Plea of insanity.*

[Formal part as in No. 69.] The defendant herein, John Doe, on being arraigned on the indictment charging him with the crime of arson, pleads not guilty thereto, and also further pleads that, at the time or times charged in the indictment, he was of unsound mind and wholly irresponsible for his acts.

No. 76.*Challenge to the panel. (Code Crim. Proc., § 863.)*

COURT OF OYER AND TERMINER — COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

}

The defendant, John Doe, hereby challenges the panel returned for present term of this court, on the following grounds :

First. That the sheriff of county intentionally omitted to summon John K. Burns, of Lansingburgh, who was regularly drawn as a juror for the present term of this court.

Second. [State any respect in which the drawing and return of the jury was not according to the forms of the Code of Civil Procedure, whereby the defendant was prejudiced.]

Dated, etc.

.....

Attorney for Defendant.

No. 77.

Challenge for actual bias. (Code Crim. Proc., § 380.)

COURT OF OYER AND TERMINER—RENSSELAER COUNTY.

THE PEOPLE
against

The defendant herein challenges..... a juror drawn to serve in this case, on the ground that said juror possesses such a state of mind regarding this case, and especially this defendant, that such juror cannot try the case impartially, and will greatly prejudice the substantial rights of this defendant.

.....
Attorney for Defendant.

No. 78.

Challenge for implied bias. (Code Crim. Proc., § 380.)

[Formal part as in No. 75.]

The defendant herein challenges John Doe, a juror drawn to serve on the present case, on the following grounds :

First. That the said John Doe is related to the person alleged to have been injured by the commission of the crime charged in this indictment within the sixth degree of consanguinity.

Second. That said John Doe served on the jury which found this indictment.

.....
Defendant's Attorney.

No. 79.

Form of special verdict. (Code Crim. Proc., §§ 438, 440.)

COURT OF OYER AND TERMINER.

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

We, the jurors in the above cause, find the following facts as established by the evidence submitted for our consideration:

First. We find that, as charged in the indictment, John Doe set fire to the building named therein.

Second. That said fire occurred between the hours of seven and eight o'clock A. M. of the 10th day of June, 1882.

Third. That said building was not used or occupied as a dwelling-house, and that at the time of said burning no human being was therein.

Dated, etc.

(Signed by jurors.)

No. 80.

Notice of argument on special verdict. (Code Crim. Proc., § 441.)

COURT OF OYER AND TERMINER—RENSSELAER COUNTY.

THE PEOPLE, Etc.,

against

JOHN DOE.

To, Esq., *District-Attorney*:

SIR.—Please to take notice that the special verdict rendered in the above cause on the 6th day of June, 1882, will be brought to argument at the present term of this court, on the 15th day of June, 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated TROY, N. Y., June 9, 1882.

Yours, etc.,

SMITH & WELLINGTON,

Attorneys for Defendant.

No. 81.

*Information for false pretenses.*STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

....., being duly sworn, says that he resides in the city of Troy, N. Y.; that on the.....day of.....1882, at said city of Troy, N. Y., one....., with intent feloniously to cheat and defraud the....., did then and there feloniously, unlawfully and designedly pretend and represent to the said.....that [here state the facts and circumstances comprising the false representations] and the said.....then and there believing the said false pretenses and representations so made as aforesaid, by the said....., and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid to deliver and did then and there deliver to the said.....of the value of.....dollars, of the proper moneys, valuable things, goods, chattels and personal property, and effects of the said.....and the said.....did then and there receive and obtain the said.....of the value of.....dollars from the said.....of the proper moneys, valuable things, goods, chattels and personal property and effects of the said.....by means of the false pretenses and representations aforesaid, with intent feloniously to cheat and defraud the said.....of the said.....of the value of.....dollars; that in fact and in truth the pretenses and representations so made as aforesaid by the said.....to the said.....was and were in all respects utterly false and untrue; that in fact and truth the said.....well knew the said pretenses and representations as by him made as aforesaid to the said.....to be utterly false and untrue at the time of making the same.

That the said....., by means of the false pretenses and representations aforesaid, feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said..... of the value of.....dollars of the proper moneys, valuable things, goods, chattels and personal property and effects of the said....., with intent feloniously to cheat and defraud the said.....of the same.

Taken, subscribed and sworn to before me, }
this.....day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 82.

Information for misdemeanor.

STATE OF NEW YORK, { ss. :
COUNTY OF RENSSELAER }

....., being duly sworn, says that he resides in the city of Troy, N. Y., in said county; that, on the.....day of....., 1882, at Troy aforesaid, one..... did unlawfully and knowingly violate section.....of chapter.....of Laws of the State of New York, passed....., relating to [give title of the statute], in that he did [here set out the facts and circumstances constituting the breach].

Subscribed and sworn before }
me, June, 1882. }

.....
Justice of the Peace (or Police Justice).

No. 83.

Information relative to dog fighting. (See Laws 1867, ch. 875, § 2.)

STATE OF NEW YORK, { ss. :
RENSSELAER COUNTY }

....., being duly sworn, deposes and says, that he resides in the.....of.....; that on the.....day of..... 188.., at the.....of....., one..... did willfully, unlawfully and wickedly encourage, aid and assist one..... to keep a certain place, to wit:..... or to receive money for the admission of divers persons to a certain place....., for the purpose of, and such place was then and there, by the aid of the said.....unlawfully

kept and used by the said.....for the purpose of fighting, baiting certain bulls, bears, dogs, cocks or other creatures, to wit:

Sworn before me, the..... }
day of....., 1882. }

Police Justice (or Justice of the Peace).

No. 84.

Information for bigamy.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

....., being duly sworn, deposes and says, that he resides in the.....of.....; that one....., on the.....day of....., at the.....of....., did marry one.....and....., the said.....did then and there have for.....and that the said.....being so married afterwards, to wit, on the.....day of....., with force and arms, at the.....of....., in the county of....., feloniously did marry and take as.....one....., and to the said.....was then and there married, the said.....being then and there living and in full life.

Subscribed and sworn before me, }
the.....day of....., }

No. 85.

Information for an affray.

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides at Troy, N. Y., in said county; that on the.....day of....., 1882, at the said city of Troy, in said county,.....did, with force and arms, make an affray by fighting with.....in a public place, to wit,against the peace of the people and the form of the statute in such case provided.

Subscribed and sworn before me, }
....., }

No. 86.

Information for assault and battery.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides at Troy, N. Y., in said county; that on the.....day of, at said city of Troy, one, with force and arms, did make an assault upon this deponent, and him, the said deponent, did then and there beat, wound and ill-treat, without cause or provocation, by.....

Subscribed and sworn before me, }
 this.....day of..... }

No. 87.

Information against keeper of bawdy house.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides in; that the premises known as No. street in said city of were, on the day of, 1882, kept, maintained and occupied by..... as a common, ill-governed and disorderly house, and common bawdy house and house of prostitution, and a resort for tipplers, drunkards, common prostitutes and reputed thieves, with other vile, wicked, idle, dissolute and disorderly men and women and reputed thieves, who, or most of whom, are in the practice of drinking, dancing, quarreling, fighting, whoring, rioting, disturbing the peace, cursing and swearing at almost all hours of the day and night, to the great damage and common nuisance of the people of the State of New York, there inhabiting, residing in the neighborhood, and passing thereby; that the grounds of deponent's knowledge are [here state grounds of deponent's knowledge and belief].

Sworn before me, }
 June ..., 1882. }

No. 88.

Information for violating city ordinance.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides in the city of Troy, Rensselaer county, N. Y.; that on the.....day of.....,

1882, in said city of Troy, onedid willfully and unlawfully violate chapter.....of title.....of the laws and ordinances of the city of Troy aforesaid, relating to [give title to the ordinance violated] in that he did [set up the facts and circumstances constituting the offense].

Sworn before me, this.... }
day of.....1882. }

No. 89.

Information for breach of the peace.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

....., being duly sworn, says that he resides.....; that on the..... day of.....one.....did make a breach of the peace by quarreling, fighting and making a large noise, and collecting a crowd in.....street of the city of Troy.

Subscribed and sworn before me, }
this....day of.....1882. }

No. 90.

Information for assault on an officer.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

....., being duly sworn, deposes and says that he.....; that on the.....day of....., 188., at the city of Troy, in said county, onewith force and arms, in and upon one.....he then and there being a.....patrolman, policeman and police officer of the police force of the said city of Troy, and a police officer and a peace officer of, in and for the said city of Troy, unlawfully and violently, without justifiable or excusable cause, did assault, beat, bruise, wound and use personal violence upon, and him evil treat, while he, the said.....so being a.....patrolman, policeman, police officer and peace officer aforesaid, was then and there lawfully engaged in the discharge of his duties as such patrolman, policeman, police officer and peace officer of said police force, and of the said city of Troy, and him, the said.....patrolman, policeman, police officer and peace officer as aforesaid, did unlawfully and willfully resist in the discharge of his duties as such.....patrolman, policeman, police officer and peace

officer, against the peace of the people of the State of New York, and the form of the statute in such case provided by.....

Sworn before me, the }
day of..... }

.....

No. 91.

Information for acts tending to create a breach of the peace.

STATE OF NEW YORK, }
 RENSSELAER COUNTY. } ss.:

....., being duly sworn, deposes and says that he resides.....; that on the.....day ofin said city [or town] one.....did [here set forth the acts creating the breach] which had a tendency to excite others and them to create a breach of the peace against the people of the State of New York, and the form of the statute in such case made and provided.

Subscribed and sworn before me, }
 this.....day of.....1882. }

.....

No. 92.

Information for perjury.

STATE OF NEW YORK, }
 RENSSELAER COUNTY. } ss.:

..... being duly sworn, deposes and says that he resides in the.....of..... that on the..... day of.....188..instant, at the.....of..... in the county of.....a certain action in which..... was plaintiff and.....was defendant, was..... before.....and that upon theof said action.....appeared as a witness for and on behalf of the said.....and was then and there duly and regularly sworn by the said.....as suchthat the evidence he should give relating to the matter in difference between the said parties should be the truth, the whole truth and nothing but the truth; and that upon the.....of the said action it then and there became material to inquire whether..... and that thereupon the said.....being so sworn as a witness as aforesaid, did then and there on the.....of said action falsely, willfully and corruptly depose, swear and testify, among other things, that..... whereas, in truth and in

fact, the
 whereby the said.....did then and there willfully and corruptly
 swear falsely and commit willful and corrupt perjury.

Subscribed and sworn before me, }
 this....day of.....1882. }

No. 93.

Information for arson, first and second degrees.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn, deposes and says that
 he resides in the.....of.....that in the.....time
 of the.....day of.....188.. one.....did
 willfully set fire to or burn a certain dwelling-house, to wit.....
in the.....of.....
 in which there was at the time human beings, to wit.....
by.....

Subscribed and sworn before me, }
 the....day of....., 1882. }

No. 94.

Information for arson, second and third degrees.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn, deposes and says that he resides
 in the.....of.....that in the.....time of the.....
 day of..... 188..in theof.....one.....
 did willfully set fire to or burn a shop, warehouse or other building, to wit:
in which there was not at the time a human being; said
adjoined to or was within the curtilage of an inhabited
 dwelling-house, to wit:so that the said house was endan-
 gered by such firing; in that said..... did.....

Subscribed and sworn before me, }
 this....day of....., 1882. }

No. 95.

Information for refusing to aid an officer.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn says that he resides in the city [or town] of..... that on the.....day of.....at said city [or town] of.....in said county.....did willfully and unlawfully disobey the command and request of.....the said.....being at the time a.....patrolman, policeman and police officer of the police force of the said city [or town] of, and a police officer and peace officer of, in and for the said city [or town] of.....and an officer authorized to execute criminal process; and the said.....having as such officer, then and there commanded the assistance of the said.....in securing and conveying to the.....one.....of the.....of.....aforesaid, that had then and there been duly arrested by the said.....policeman, and police officer as aforesaid, against the peace of the people of the State of New York, and the form of the statute in such case provided.

Subscribed and sworn before me, }
 this....day of.....1882. }

No. 96.

Information for interfering with an officer.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn, deposes and says that he is a policeman in said city of Troy; that on the.....day of.....188.., at the city of Troy, in said county,....., with force and arms, did unlawfully, designedly and feloniously, forcibly interfere with....., he then and there being a member of the police force of the city of Troy, to wit, a policeman,.....and having in legal custody one....., upon a criminal charge, to wit, upon the charge of....., committed by him, the said....., upon one....., by [state the nature of the offense].

Subscribed and sworn before me, }
 the.....day of....., 1882. }

No. 97.

Information for larceny.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

....., being duly sworn, says he resides at;
 that on the day of, 1882, in said city [or town] afore-
 said, divers goods, chattels, money and property of deponent, of the kind,
 description and value as follows, to wit [give description and value with
 particularity], were feloniously taken and stolen and carried away from the
 possession of deponent by one John Doe, by [give manner of the taking].

Sworn before me, this }
 day of, 1882. }

No. 98.

Information for burglary, first degree and larceny.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

....., being duly sworn, deposes and says that he resides
 in the of; that on the day of
 188...., at the city of in said county, with
 force and arms, about the hour of in the night-time of the same
 day, the dwelling-house of another, to wit, of one
 there situate, feloniously and burglariously did break into and enter by forcibly
 bursting and breaking an outer door of the said dwelling, or by
 in which said dwelling-house there was then at the same
 time some human being, to wit,, with intent feloniously
 and burglariously to commit some crime therein, to wit, then and there the
 goods and chattels of the said in the said dwelling-house
 then and there being, and then and there feloniously and burglariously to steal,
 take and carry away, and
 of the value of dollars, of the goods, chattels and property
 of the said in the said dwelling-house then and there
 being, feloniously, burglariously, did steal, take and carry away by

Taken, subscribed and sworn to before me, }
 this day }

No. 99.

*Information for larceny from the person.*STATE OF NEW YORK, } ss. :
COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the.....of.....; that on the.....day of..... 188...., at the city of....., in said county,.....with force and arms, from the person of..... of the value of.....dollars, of the goods, chattels and personal property of the said..... then and there being found, feloniously did steal, take and carry away by [give manner of the carrying away].

Subscribed and sworn before me, }
this.....day of..... }

No. 100.

*Information for robbery, first degree.*STATE OF NEW YORK, } ss. :
COUNTY OF.....

....., being duly sworn, says that he resides at; that, on the.....day of....., at the city [or town] of....., in said county.....with force and arms, in and upon one....., then and there being, feloniously did make an assault, and him, the said..... did then and there feloniously put in fear of some immediate injury to his person and in danger of his life, did then and there feloniously and violently steal, take and carry away from the person, and against the will of the said value of.....dollars, of the goods, chattels and property of the said by [state the manner of taking].

Sworn and subscribed to before me }
this.....day of..... }

No. 101.

*Information for burglary and larceny.*STATE OF NEW YORK, } ss. :
COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the.....of.....; that, on the.....day of 188...., at the city of....., in said county,with force and arms, the.....

of one.there situate, feloniously and burglariously did break into and enter, the same being aas above, in which divers goods and merchandise and valuable things were then and there kept for use, sale and deposit, to wit, the goods and chattels of the said in said..... as above, then and there being, then and there feloniously and burglariously to steal, take and carry away.....of the value of..... dollars, of the goods and chattels and property of the said..... in the said.....as above, so kept as aforesaid, then and there being feloniously and burglariously did steal, take and carry away by [state the manner of taking].

Taken, subscribed and sworn to before me }
 this.....day of }

No. 102.

Information for receiving stolen goods.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in the of; that, on the day of, 188., at the city of, in said county, being a person of evil name and fame and dishonest conversations, and common buyer and receiver of stolen goods, with force and arms, of the value of dollars, of the goods and chattels of..... by, then lately before feloniously stolen of the said, unlawfully, unjustly and for the sake of wicked gain, did feloniously receive and have the said, then and there well knowing the said goods and chattels to have been feloniously stolen; that the facts upon which this affidavit is based are as follows : [State the facts and circumstances.]

Subscribed and sworn to before me, }
 this day of }

No. 103.

Information for embezzlement.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that on or about the day of 188., at the city of,

in said county, one, being a servant or agent of
, and not an apprentice, nor within the age of
 eighteen years, did feloniously embezzle and convert to his own use, without
 the assent of the said, the property of the said
, which had come into possession of said
 as such servant or agent by

Subscribed and sworn to before me, }
 this day of }

.....

No. 104.

Information for libel.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in the.....
 of; that on the day of instant,
 at, in said county, one did
 falsely, maliciously and scandalously frame, make, write and compose in a
 certain false, scandalous and libelous writing of, concerning and against the
 said, to the purport and effect following, to wit:

 and that with intention to scandalize and disgrace the said
 and to bring him into contempt, infamy and disgrace, the said
 did afterwards, on the day of at
 the aforesaid, openly deliver and publish to the
 said false, scandalous and libelous, in that he did

Subscribed and sworn to before me, }
 this day of }

.....

No. 105.

Information for assault with a sharp and dangerous weapon.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he
 resides in the of; that on the
 day of, 188., at the, in said
 county, with force and arms, in and
 upon the said, then and there being, did make an assault,
 and the said with a certain, the

said, being then and there a sharp, dangerous weapon, which the said, then and there, in his hand had and held, then and there did beat, strike, cut, stab and wound, with intent upon him, the said, then and there feloniously to do bodily harm, without justifiable or excusable cause, by

Subscribed and sworn before me, }
the day of }

No. 106.

Information for seduction.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that she resides in the of; that on the day of 188., at the in said county, with force and arms, under promise of marriage, did seduce and have illicit connection with one she the said then and there being an unmarried female of previous chaste character, by [state the manner and circumstances].

Subscribed and sworn to before me, }
this day of }

No. 107.

Information for forgery.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that one at in with intent to injure and defraud, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting, a certain, which said false, forged and counterfeited is as follows, that is to say by [state the method of execution].

Subscribed and sworn before me, }
this day of }

No. 108.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 1.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

.....of No.....street, in the city of
.....being duly sworn, says that she is the wife of.....
of said city; that she complains of her said husband of being a disorderly person, according to section 899 of the Code of Criminal Procedure, for that he has actually abandoned his wife and children without adequate support, and has left them in danger of becoming a burden upon the public, and he neglects to provide for them according to his means. Deponent further says that for several days last past he has actually abandoned his family without adequate support, and left them in danger of becoming a burden upon the public, and that such family is not possessed of property or of the means of obtaining a livelihood without the aid of such husband.

Subscribed and sworn before me, }
this....day of..... }

No. 109.

Information against disorderly person, under Code Criminal Procedure, § 899, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

.....of No.....street, in the city
of Troy, being duly sworn, says that she complains of her husband,
.....of said city, of being a disorderly person,
according to section 899 of the Code of Criminal Procedure, for that he threatens to run away and leave his wife and children a burden upon the public, and that such family is not possessed of property or of the means of obtaining a livelihood without the aid of such husband.

Subscribed and sworn before me, }
this....day of.....188.. }

No. 110.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 3.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

.....being duly sworn, says that he resides in.....;
that one.....is a person in said city [or town], of.....who
pretends to tell fortunes, and where lost and stolen goods may be found, in
that he possesses supernatural gifts, and to the end that he extort money
[describe the manner of operation, etc.].

Subscribed and sworn before me, }
this....day of.....

No. 111.

Information against disorderly person, under Code Criminal Procedure, § 899, subdivision 4.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

.....being duly sworn, says that he resides at.....
that one.....is a person who keeps a bawdy house in the city of
.....and a house for the resort of prostitutes, drunkards, tipplers
gamblers, habitual criminals, and other disorderly persons, in that he.....

Subscribed and sworn before me, }
this....day of.....

No. 112.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 5.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, deposes and says that he resides
in.....; that one.....is a person in the city of.....,
who has no visible profession or calling by which to maintain himself, but
who does so for the most part by gaming, in that he.....

Subscribed and sworn before me, }
this....day of.....

No. 113.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 6.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in.....; that one.....in the city of..... is a juggler, common showman and mountebank, who exhibits and performs for profit, puppet shows, wire and rope dancers, and other idle shows, acts and feats, in that he [describe acts complained of].

Subscribed and sworn before me, }
this.....day of..... }

No. 114.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 7.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

....., being duly sworn, says that he resides in.....; that one.....in the said city of....., is a person who keeps in a public highway or place in said city of.....an apparatus or device for the purpose of gaming, and who goes about exhibiting tricks and gaming therewith, in that he [describe acts complained of].

Subscribed and sworn before me, } ss.:
this.....day of..... }

No. 115.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 8.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that one..... is a person who plays in a public highway, or place, in said city [or town] with cards, dice and other apparatus or device for gaming; that [set out the specific acts complained of].

Subscribed and sworn before me, }
this... day of..... }

No. 116.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 9.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that..... who is an habitual criminal, and adjudged such at..... in the State of New York, on the..... day of....., was found in..... in said city of..... as follows:..... under circumstances giving reasonable ground to believe that he was intending or waiting the opportunity to commit the crime of.....

Subscribed and sworn before me, }
this..... day of..... }

No. 117.

Information against habitual criminal, under Code Criminal Procedure, § 512, subdivision 1; also § 899, subdivision 9.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that....., who is an habitual criminal, and adjudged such at..... in the State of New York, on the..... day of....., was found in..... in said city of..... in possession of..... a deadly and dangerous weapon, and in possession of..... a tool, instrument and material adapted to and used by criminals for the commission of crime; said possession was as follows:.....

Subscribed and sworn before me, }
this..... day of..... }

No. 118.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 1.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., of the city of , being
duly sworn, says that one , who is now in said
city [or town] of , is a person who, not having visible
means of support, lives without employment, in that he [state circumstances
and facts leading to that belief].

Sworn and subscribed before me, }
this day of }

No. 119.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
the of; that
who resides in , is a person who, being an habitual drunkard,
abandons, neglects and refuses to aid in the support of his family, in that
he

Subscribed and sworn before me, }
this day of }

No. 120.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 3.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
the of; that
who resides in , is a person who has contracted an infectious
and other diseases in the practice of drunkenness and debauchery, requiring
charitable aid to restore him to health, in that he

Subscribed and sworn before me, }
this day of }

No. 121.

Information against vagrant, under Code of Criminal Procedure, § 887, subdivision 4.

STATE OF NEW YORK, } ss. :
COUNTY OF....., }

....., being duly sworn, says that.....
who resides at....., is a common prostitute, who has
no lawful employment whereby to maintain herself; that she [state facts and
circumstances on which affidavit is based].

Subscribed and sworn before me, }
this.....day of..... }

No. 122.

Information against vagrant, under Code of Criminal Procedure, § 877, subdivision 5.

STATE OF NEW YORK, } ss. :
COUNTY OF....., }

....., being duly sworn, says that he resides in
.....; that....., in the said city
of....., is a person who wanders abroad and begs in said city
aforesaid, and who goes about from door to door in said city, and places him-
self in the streets, highways, passages and other public places in said city, to
beg and receive alms, in that he [state facts and circumstances].

Subscribed and sworn before me, }
this.....day of..... }

No. 123.

Information against vagrant, under Code of Criminal Procedure, § 887, subdivision 6.

STATE OF NEW YORK, } ss. :
COUNTY OF....., }

....., being duly sworn, says that he resides in
the; that..... in said
city [or town] of is a person who wanders abroad and lodges
in taverns, groceries, ale-houses, watch and station-houses, out-houses, market
places, sheds, stables, barns and uninhabited buildings, in said city, and in

the open air, and not giving a good account of himself, in that he [set up facts of the case].

Subscribed and sworn before me, }
 this.....day of..... }

No. 124.

Information against vagrant, under Code of Criminal Procedure, § 887, subdivision 7.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in
; that.....in said city of.....
 is a person who, having his face painted, discolored, covered and concealed,
 and being otherwise disguised in a manner calculated to prevent his being
 identified, appears in a road and public highway in said city, and in a field,
 lot, wood and inclosure in said city, in that [give facts and circumstances in
 detail].

Subscribed and sworn before me, }
 this... ..day of..... }

No. 125.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 8.

STATE OF NEW YORK, } ss.:
 COUNTY OF

.....being duly sworn, says that he resides at
, in the city [or village] of....., and that
is a child between the ages of five and four-
 teen years, to wit, of the age of nine years, having sufficient bodily health and
 mental capacity to attend the public schools, and that on the...day of
1882, in the city of....., the said.....
 was found wandering abroad during the school hours in the streets of the city
 of....., a truant without lawful occupation, in that [describe acts
 and circumstances].

Subscribed and sworn before me, }
 this....day of..... }

No. 126.

Information against disorderly child.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that ..he
.....in.....that.....is a dis-
orderly child, for that ..he.....deserted h.. home
without good and sufficient cause, and kept company with dissolute or vicious
persons, against the lawful commands of h.....
and is a disorderly child within the intent and meaning of the statute; and is
of the age of.....years; that the facts upon which this affidavit is
based are as follows:.....

Subscribed and sworn before me, }
this....day of..... }

No. 127.

Information against persons selling chattels, under Laws of 1868, chapter 280.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he
resides in; that he did, on the day of,
188..., hire, loan and let to one, a,
and said did, without the consent of.....,
who is the owner thereof, sell and deliver the same, or did pawn or pledge
the same, at, to one, and obtained
thereon and therefor the sum of

Subscribed and sworn before me, }
this day of }

No. 128.

*Information against person selling material, etc., furnished to be manufactured,
under Laws of 1881, chapter 419.*

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he
resides in the of; that on the
day of, at the, of, one
..... did willfully pawn, pledge, sell and convert to

h... own use, material, to wit :
 of the value of, furnished to h... by
 for the purpose of being manufactured into by

Subscribed and sworn before me, }
 this day of }

.....

No. 129.

Information against fighting animals, etc., under Laws of 1874, chapter 12, § 7.

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

....., being duly sworn, complains, deposes and says, that he resides in the of; that he has just and reasonable cause to suspect and does suspect that certain of the provisions of law relating to and affecting animals, and especially the provisions of the following laws made and passed, to wit: "An act to prevent prize fights and fights among game animals," passed April 4, 1856, and "An act for the more effectual prevention of cruelty to animals," passed April 12, 1867, and "An act relating to animals," passed February 11, 1874, are being and are about to be violated by
 at and within the particular building and place within the.....
 known as....., and now occupied, kept and used by.....

Wherefore this deponent prays that a warrant may be immediately issued and delivered, pursuant to the statute in such case made and provided, to any person authorized by law to make arrest for such offenses, authorizing him to enter and search such building and place, and to arrest the said.....
 by whatsoever names they may be known or called, or any or either of them there present from violating any of said laws, and to bring such person, when so arrested, before the nearest magistrate of competent jurisdiction, to be dealt with according to law.

Subscribed and sworn before me, }
 this day of }

.....

No. 130.

Information for reckless driving, under Laws 1824, chapter 347, § 2; Laws 1826 chapter 254, §§ 6, 7, 9.

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

....., being duly sworn, deposes and says, that he resides in the of; that one, who was then and there driving a certain carriage, to wit, a.....

upon a certain turnpike road or public highway within this State, to wit, upon a certain in the of which then and there was such a turnpike road or public highway, with or without passengers, in said carriage, did then and there at the time and place aforesaid, willfully, unlawfully, wickedly and maliciously run, cause or permit to be run his horses then and there attached.

Subscribed and sworn before me, }
this day of }

No. 131.

Information for keeping gambling place, under Laws 1851, chapter 504, § 1.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the of; that on the day of, and at the present time, did and does keep a room, building, arbor, booth, shed, tenement, boat or float, to wit: at, in the of to be used or occupied for gambling, to wit:, or did or does knowingly permit the same to be used or occupied for gambling, to wit: being the owner, superintendent or agent of a room, building, arbor, booth, shed, tenement, boat or float, to wit: ... at, in the of, did and does rent the same to be used or occupied for gambling, to wit:

Subscribed and sworn before me, }
this day of }

No. 132.

Information for keeping place for fighting animals, etc., under Laws 1867, chapter 875, § 2.

COUNTY OF RENSSELAER, ss.:

....., being duly sworn, says that he resides at; that on the day of, in the city [or town] of, in the said county of, one willfully, unlawfully and wickedly, did keep, use, was connected with as, interested in the management of, did receive money for the admission of divers persons to a certain place, to wit: for the purpose of, and such place was

then and there kept or used for the purpose of fighting or baiting certain bulls, bears, dogs, cocks or other creatures, to wit:

Subscribed and sworn before me, }
this day of }

.....

.....

No. 133.

Information for confining cows in a crowded condition, under Laws 1864, chapter 544.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that, on the day of at the of in the county of one wickedly, unlawfully and willfully, then and there, to wit, in in said city, did keep divers cows for the production of milk for market, sale or exchange, in a crowded and unhealthy condition, or did feed divers cows, then and there kept by him, the said on food that produces impure, diseased and unwholesome milk, to wit, distillery waste, usually called swill, or in violation of the statute in such case made and provided.

Subscribed and sworn before me, }
this day of }

.....

.....

No. 134.

Information for abandoning maimed creature in a public place.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that, on the day of one did willfully, unlawfully and wickedly, then and there, abandon to die, in a certain public place in said city of Albany, to wit, a certain maimed, sick, infirm and disabled creature, to wit [describe the particular case complained of].

Subscribed and sworn before me, }
this day of }

.....

.....

No. 135.

Information for wrongs affecting public moneys, etc., under Laws 1875, chapter 19, § 1.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that one with intent to defraud, did wrongfully obtain, receive, convert, pay out and dispose of, or who, with like intent, by willfully paying, allowing or auditing a false or unjust claim, or did aid or abet in wrongfully obtaining, receiving, converting, paying out or disposing of money, funds, credits and property held or owned by this State, or held or owned, officially or otherwise, for or on behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, agency or agent of a city, county, town, village and civil division, subdivision, department or portion of this State, to wit: by

Subscribed and sworn before me, }
this.....day of..... }

No. 136.

Information against person having custody of child permitted to beg, under Laws 1881, chapter 496, § 2.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that has the custody of....., a child under the age of fourteen years, and permits and neglects to restrain such child from begging, gathering picking and sorting of rags, and from collecting cigar stumps, bones and refuse from markets in said city of, in that he.....

Subscribed and sworn before me, }
this.....day of..... }

No. 137.

Information for selling mortgaged property, under Laws of 1871, chapter 77.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the of; that on the day of one..... gave, executed and delivered to a mortgage upon certain personal property, to wit:

..... of the value of dollars.

That afterwards and on the day..... 188.. at..... in said county of Albany, while the said mortgage was a lien on the said personal property, the said..... with intent to defraud said the mortgagee of said property, or..... a purchaser of said property from said..... did willfully, maliciously and unlawfully sell, assign, exchange and secrete the aforesaid personal property so mortgaged or sold as aforesaid by said..... to said..... by.....

Subscribed and sworn before me, }
this..... day of }

No. 138.

Information for setting on foot fights among game animals, under Laws of 1856, chapter 98.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the of; that on the day of at the of in the county of one..... did wickedly, unlawfully and willfully set on foot, instigate, move to, carry on, promote, engage in as a witness, assistant, umpire or judge, or did towards the furtherance of a premeditated fight or contention between game birds, game cocks, dogs, bulls, bears, dogs and rats, dogs and badgers or other animals, to wit: which had been theretofore and was then and there, to wit: on the day aforesaid at the and in the county aforesaid, premeditated by certain persons..... who then and there, to wit: at the time aforesaid, and in the place aforesaid, did have the ownership or custody of such animals, to wit: of the afore-

said.,in violation of the statute in such case made and provided.

Subscribed and sworn before me, }
this.....day of..... }

No. 139.

Information against permitting a place to be kept for fighting dogs, etc., under Laws of 1887, chapter 875, § 2.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the.....of.....; that on the.....day of..... one.....did permit and suffer a certain place, to wit,.....to be kept and used for the purpose of fighting or baiting bulls, bears, dogs, cocks or other creatures, to wit,.....he, the said.....being the.....thereof.

Subscribed and sworn before me, }
this.....day of..... }

No. 140.

Information against person arrested without warrant for committing felony in another county, under Code of Criminal Procedure, § 477, subdivision 3.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he is a policeman [or other officer] in the.....aforesaid; that having reasonable cause for believing that one.....committed the crime of.....in.....he arrested him without a warrant on the.....day of....., at said.....; that the grounds of deponent for believing that said.....committed said crime are as follows : [Describe grounds of belief.]

Subscribed and sworn before me, }
this.....day of..... }

No. 141.

Information for public intoxication.

STATE OF NEW YORK, } ss.:
 COUNTY OF }

....., being duly sworn, deposes and says that he is a policeman [or other officer] of the; that the above-named defendant was, on the day of, 188.., about ... M., intoxicated in a public street or place, to wit: street in said, contrary to the provisions of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, and the act amendatory thereof, passed May 11, 1869.

Subscribed and sworn before me, }
 this day of }

No. 142.

Information for assault with intent to ravish a woman of ten years and over

STATE OF NEW YORK, } ss.:
 COUNTY OF }

....., being duly sworn, deposes and says that he resides in the of; that on the day of, 188.., at the in said county, one with force and arms, in and upon, she then and there being a woman of the age of ten years and upwards, violently, forcibly and feloniously, did make an assault, and her, the said, then and there violently, forcibly and against her will, feloniously did ravish and carnally know [describe the manner of effecting the same].

Subscribed and sworn before me, }
 this day of }

No. 143.

Information against assault with intent to ravish a woman under the age of ten years.

STATE OF NEW YORK, } ss.:
 COUNTY OF }

....., being duly sworn, says that he resides in; that on the day of, at, in said county, one, with force and arms in and upon, she then and there being a woman of the age

of nine years, violently, forcibly and feloniously did make an assault, and her the said then and there violently, forcibly and feloniously, and against her will, did ravish and carnally know by [describe the assault].

Subscribed and sworn before me, }
 this day of }

.....

No. 144.

Information for assault with intent to ravish woman — ten years and over.

COUNTY OF ss.:

....., being duly sworn, deposes and says that he resides in the of; that on the day of 188 .., at, in said county, with force and arms, in and upon, she then and there being a woman of the age of ten years and upwards, in the peace of God and of the said people then and there being, violently, forcibly and feloniously, did make an assault, and her, the said, then and there violently, forcibly and against her will, feloniously did ravish and carnally know by

Taken, subscribed and sworn before }
 me, this day of, 188 .. }

.....

Justice of the Peace (or Police Justice).

No. 145.

Information for seizure, etc., of gambling apparatus, under Laws 1851, chapter 504.

COUNTY OF ss.:

....., being duly sworn, deposes and says that he resides in the of; that one has committed an offense against the provisions of "An act more effectually to suppress gambling," passed July 10, 1851, in that he did and has, as deponent has reason to believe and does believe, upon his person or at, in the of, certain articles of personal property, to wit: or gambling tables, devices or apparatus for the purpose of, or public or private lottery policies, to wit:, the discovery of which may lead to establish the truth of said charge for which complaint is hereby made against said

Wherefore, deponent prays that a warrant may issue as provided by law for the arrest of said, for diligent search to be made for such property, tables, devices or apparatus, and if found, to bring the same before

the magistrate or justice issuing the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the county of

Subscribed and sworn before me, }
this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 146.

Information for assault with intent to kill.

COUNTY OF, ss. :

....., being duly sworn, deposes and says that he resides in the of; that on the of, 188...., at the in said county, with force and arms, in and upon the said then and there being, feloniously did make an assault, and the said with a certain, which the said then and there in hand had and held, the said being then and there a deadly weapon, and such means and force as was then and there likely to produce death, feloniously did beat, strike, cut and wound with intent him, the said, then and there, feloniously and willfully to kill by

Subscribed and sworn before me, }
this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 147.

Information against child begging, etc., under section 893, Code of Criminal Procedure.

COUNTY OF, ss. :

....., being duly sworn, deposes and says that he resides in; that on the day of, 188...., one....., a child of the age of years, was found begging for alms and soliciting charity from door to door in the said....., and was found begging for alms and soliciting charity in a street, highway and public place in said city, to wit, in that ..he.....

Subscribed and sworn before me, }
this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 148.

Information for mayhem, under Laws 1880, chapter 449.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the.....of.....; that, on the.....day of....., 188., at the.....of....., one..... then and there feloniously, willfully and maliciously did, on purpose, and from premeditated design, or with intent to kill or commit a felony, to wit, cut out or disable the tongue of one..... put out the eye of one..... slit or destroy the lip of one, or slit or destroy the nose of one....., cut off or disable a limb or member, to wit:..... of..... on purpose..... by.....

Subscribed and sworn before me, }
this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 149.

Information for search warrant, under Code of Criminal Procedure, § 292, subdivision 3.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that the following property..... is in the possession of.....at....., with the intent to use it as the means of committing a public offense, or is in the possession of....., to whom said..... delivered it for the purpose of concealing it, or preventing its being discovered; that the facts upon which this affidavit is based are as follows:.....

Subscribed and sworn before me, }
this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 150.

*Information for search warrant, under Code of Criminal Procedure, section 792
subdivision 2.*

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
.....; that the following property.....
.....
has been used as the means of committing a felony by.....
at or is in the possession of
at or is concealed in in.....
that the facts upon which this affidavit is based are as follows:

Subscribed and sworn before me, }
this.....day of188.. }

.....
Police Justice (or Justice of the Peace).

No. 151.

*Information for search warrant, under Code of Criminal Procedure, section 792,
subdivision 1.*

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
.....; that the following property.....
.....
has been stolen or embezzled from at
that is the owner thereof; that said property has been
stolen by and is now in his possession, or the pos-
session of at the
aforesaid, or is concealed in in said
that the facts upon which this affidavit is based are as follows:

Subscribed and sworn before me, }
this.....day of188.. }

.....
Police Justice (or Justice of the Peace).

No. 152.

Information for felony or misdemeanor.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in.....; that one..... at the..... in the county of..... aforesaid, on the..... day of 188.., did feloniously, wrongfully, unjustly, unlawfully, wickedly, willfully, corruptly, falsely, maliciously and knowingly violate chapter..... of the laws of the State of New York, passed..... in that he did....

Subscribed and sworn before me, }
 this.....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 153.

Information for malicious trespass.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in..... street in the....., in the county aforesaid; that on the..... day of....., in said city, one..... did maliciously, unlawfully, willfully and wantonly..... by.....

Subscribed and sworn before me, }
 this.....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 154.

Information for overdriving, etc., any living creature, under Laws of 1867, chapter 375, section 1.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the..... of.....; that on the..... day of 188.. at the..... of..... one..... did willfully, unlawfully, wickedly, or cause or procure, to overdrive, overload, torture, torment, deprive of necessary sustenance, unnecessarily beat, cruelly beat,

needlessly mutilate, needlessly kill, a certain living creature, to wit:.....
 by then and there.....

Subscribed and sworn before me, }
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 155.

Information for assault with intent to kill with fire arms.

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he
 resides in the.....of.....; that on the.....day of
 188.. at the.....in said county,with force and
 arms, in and upon the body of.....in the peace of the said
 people, then and there being, feloniously did make an assault, and to, or toward
 and against.....the said.....a certain.....
 then and there loaded and charged with gunpowder and lead, which the said
 then and there had and held the same, being then
 and there likely to produce death, willfully and feloniously did then and
 there shoot off and discharge with intent him the said.....
 thereby then and there feloniously and willfully to kill
 by

Subscribed and sworn before me, }
 this.....of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 156.

*Information for murder perpetrated from deliberate design, under chapter 833,
 Laws of 1876.*

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he
 resides in the of; that one,
 of, in the county of, on the day
 of, 188 .., with force and arms, did then and there feloniously,
 willfully and intentionally, and from a premeditated and deliberate design to
 effect the death of one, kill the said
 by

Subscribed and sworn before me, }
 this....day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 157.

*Information for manslaughter, first degree—killing unborn quick child—under
2 Edmond's Statute, 681.*

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that ..he
resides in the of; that on the day of
....., 188...., at, in the county of.....,
one did feloniously and willfully kill an unborn quick
child by an injury to the mother of such child, in that ..he did.....

Subscribed and sworn before me, }
this.... day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 158.

*Information for allowing disabled animals to lie in highways, etc., in violation of
section 2, chapter 682, Laws 1866.*

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

.....being duly sworn, deposes and says that
he resides in the.....of.....; that on the.....day of
....., 188.., at the....., one.....,
then and theretofore being the owner, driver or in possession of a certain old,
maimed and diseased horse or mule, which had theretofore been turned loose
or left disabled in a certain street, lane or public place in said.....
to wit,.....did unlawfully, willfully and wickedly,
for more than three hours after knowledge of such disability, allow such horse
or mule to lie in a certain street, lane or public place in said city therein,
to wit,.....

Subscribed and sworn before me, }
this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 159.

*Information for carrying creatures in a cruel manner, under chapter 375, section 5,
Laws of 1867.*

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, deposes and says that
he resides in the.....of.....that on the.....day of
.....188.. one.....did willfully,

unlawfully and wickedly carry or caused to be carried in or upon a
a certain creature, to wit,.....
 in a cruel and inhuman manner, by then and there.....

Subscribed and sworn before me, }
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 160.

*Information for murder perpetrated in commission of a felony, under Laws 1856,
 chapter 833.*

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides
 in the.....of.....; that on the.....day of
 188., at the.....of.....in the county of.....
 one.....did feloniously and willfully and intentionally, whilst
 engaged in the commission of a felony, kill one.....in that
 he did.....

Subscribed and sworn before me, }
 this.....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 161.

*Information for murder perpetrated by an act dangerous to others, under Laws
 1876, chapter 333.*

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he
 resides in the.....of.....; that, on the.....day of
, 188., at the.....of....., in the county
 of....., one.....did feloniously, willfully
 and intentionally, by an act immediately dangerous to others, and evincing a
 depraved mind, regardless of human life, did kill one.....,
 although without any premeditated design to effect the death of any par-
 ticular individual, in that ..he did

Subscribed and sworn before me, }
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 162.

Information for injury to animal, by act or neglect, in violation of Laws 1866, chapter 682, § 1.

STATE OF NEW YORK, } ss. :
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of ; that on the day of 188., at the, in the county of one did, by his act or neglect, willfully, wickedly and maliciously kill, maim, wound, injure, torture and cruelly beat a certain horse, mule, ox, cattle, sheep or other animal, to wit: belonging to him the said or to one by then and there

Subscribed and sworn before me, }
this.....day of188.. }

.....
Police Justice (or Justice of the Peace).

No. 163.

Information for malicious mischief, under Laws of 1877, chapter 451.

STATE OF NEW YORK, } ss. :
COUNTY OF

....., being duly sworn, deposes and says that he resides in ; that one on the day of 188., at the of did maliciously or wantonly injure or deface a monument or work of art, building, fence or other structure, or did destroy or injure an ornamental tree, shrub or plant, situated on a private ground or on a street, public place, public or private way or cemetery; or did paint or print upon or in any other manner place upon or affix to any stone or rock, not a part of a building, or upon or to any bridge or tree, words, letters, characters or devices, stating, referring to or advertising, or intended to state, refer to or advertise the sale or manufacture of any property or article, profession, business, exhibition, amusement or place of amusement, or other thing, or did directly or indirectly cause any such act to be done, or shall aid therein, by.....

Subscribed and sworn before me, }
this.....day of188.. }

.....
Police Justice (or Justice of the Peace).

No. 164.

Affidavit to obtain search warrant, under Code of Criminal Procedure, § 798.

STATE OF NEW YORK, } ss. :
COUNTY OF.....

....., being duly sworn, says that he resides at
....., in the said county of.....; that, at.....
aforesaid, on the night of....., certain goods and
chattels, to wit [describing them] were stolen and carried away from his
residence without his knowledge or consent, and that there is probable cause
for suspecting that one....., residing at No.
.....street, in....., is the party
who stole and carried away said goods and chattels; and that said goods and
chattels are now secreted in the house of the said.....,
at No.....street, in.....

Subscribed and sworn before me, }
this....day of.....188.. }

No. 165.

Form of search warrant, under Code of Criminal Procedure, § 797.

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the city [or county] of.....

Proof by affidavit having been this day made before me, by.....
that the property hereinafter described was stolen or embezzled; that there is
probable cause for believing that the said property was stolen or embezzled,
you are therefore commanded in the day-time, or at any time of the day or
night, to make immediate search on the person of.....,
or in the....., situated.....,
for the following property:....., and if you find the
same, or any part thereof, to bring it forthwith before me, at.....,
in the.....

Dated at....., the day of.....

No. 166.

Search warrant, under Code of Criminal Procedure, § 792, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the city (or county) of.....:

Proof by affidavit having been this day made before me, by....., that the property hereinafter described was used as the means of committing a felony, to wit:; that there is probable cause for believing that the property hereinafter described was used as the means of committing a felony, to wit:; you are therefore commanded in the day-time, or at any time of the day or night, to make immediate search on the person of....., or in the....., situated....., for the following property:..... and if you find the same, or any part thereof, to bring it forthwith before me, at....., in the.....

Dated at, the day of

No. 167.

Return to search warrant, under Code Criminal Procedure, § 805.

I, the undersigned, to whom this warrant was delivered for execution, do hereby certify that I did this.....day of.....take the property therein described from.....at.....under and by virtue of this warrant, and an inventory has been taken of this property which is hereto annexed.....

Dated at, the day of

A. B.,
Constable (or other officer).

No. 168.

Search warrant, under Code Criminal Procedure, § 972, subdivision 3.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the city [or county] of.....

Proof by affidavit having been this day made before me, by..... that the property hereinafter described is in the possession of..... with the intent to use it as the means of committing a public offense, to wit,or is in the possession of.....to whom said.....delivered it for the purpose of concealing it and preventing its being discovered; that there is probable cause for believing that the property hereinafter described is in the possession of..... with the intent to use it as the means of committing a public offense, to wit,or is in the possession of.....

to whom said delivered it for the purpose of concealing it and preventing it being discovered.

You are therefore commanded in the day time, or at any time of the day or night, to make immediate search on the person of or in the situated for the following property: and if you find the same, or any part thereof, to bring it forthwith before me, at in the
Dated at, the day of

No. 169.

Inventory and affidavit thereto of property taken under search warrant, under Code Criminal Procedure, §§ 805, 806.

STATE OF NEW YORK, } ss.:
COUNTY OF

Inventory of property taken by the undersigned, under and pursuant to the annexed warrant, made publicly and in the presence of, from whose possession it was taken, and of the applicant for the warrant

Dated

.....
Policeman (or other officer).

I,, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn before me, }
this day of }

No. 170.

Receipt for property taken under search warrant, under Code Criminal Procedure, § 808.

I,, a constable [or other officer] of the of, have taken under a search warrant issued by a justice of the peace [or other officer] of the, from from whom it was taken, or in whose possession it was found, or from, in the said, where the property hereinafter described was found, no person being there, the following described property, to wit:

A. B.,
Constable (or other officer).

No. 171.

Warrant for disorderly person, under Code Criminal Procedure, § 899.

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of

Whereas, Information on oath has this day been duly made by of the city of in the county of, before me, one of the police justices [or justices of the peace] of the said city of, that on the day of, 188., at the city of, in said county, and for several days last past, one was and is a disorderly person, for that he has actually abandoned his wife and children without adequate support, and has left his wife and children in danger of becoming a burden upon the public; and has neglected to provide for his wife and children according to his means, against the peace of the people of the State of New York and the form of the statute in such case provided.*

We, therefore, command you forthwith to apprehend and take the body of the said and bring him before the said, at the, in the said city of, for examination, with this warrant and a return of your doings thereon indorsed, to answer the said complaint, and to be dealt with according to law Hereof fail not at your peril.

Witness, the said, at the city of, in the county aforesaid, the day of

*.....
Police Justice (or Justice of the Peace).*

NOTE. — To adapt the above form for each subdivision of § 899, insert after the star in the above the substance of each subdivision as the case requires.

No. 172.

Return to warrant against disorderly person.

By virtue of the within warrant I have arrested the within named and now have him before the magistrate by whom this warrant was issued.

Dated, etc.

*A. R.,
Constable (or other officer).*

No. 173.

Commitment of disorderly person, under Code of Criminal Procedure, § 193.

The within named having been brought before me under this warrant, is committed for examination to the sheriff of the county of.....

A. B.,
Justice of the Peace, etc.

No. 173½.

Order that arrest be made on Sunday, under Code of Criminal Procedure, § 170.

I do hereby order and direct that the arrest on the within warrant may be made on Sunday or at night.

A. B.
Justice of the Peace, etc.

No. 174.

*Warrant to commit a child under the age of sixteen years—Plea of guilty—
under Laws 1881, chapter 496.*

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the county of....., and
to the superintendent of the House of Refuge for the Reformation of Juvenile
Delinquents, in the city of New York, GREETING:

Whereas, On the.....day of....., 188.,
was brought before me,....., one of the justices of the
peace in and for the county of....., charged on the
oath of....., which oath was believed by me,
the said justice, with, on this present day, at the city of.....

And, whereas, The said justice, immediately and before any further proceed-
ings were had, informed the said of the charges
against h... and of h... right to the aid of counsel in every stage of the
proceedings, and the said charge was then and there distinctly read and stated
to the said....., and he, the said.....,
was given a reasonable time to send for and advise with counsel.

And, whereas, He, the said....., did then and there
plead guilty to the said charge.

And, whereas, It was ascertained by said justice that said
was.....years old on the.....day of....., 188..

And whereupon the said justice did thereupon adjudge and determine that
the said.....was guilty of the aforesaid charge and
offense, and the said.....was thereupon convicted of
the charge and offense aforesaid; and it was adjudged and determined by me
that the said.....should be committed to, and

confined in, the House of Refuge for the Reformation of Juvenile Delinquents in the city of New York, until he should be thence discharged according to law.

Now, therefore, you, the said sheriff, constable marshal, or policeman, are commanded forthwith to convey and deliver the said..... into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said..... into your custody, in the said House of Refuge, and h... there safely keep until ..he shall be thence discharged according to law.

Given under my hand, at..... aforesaid, this ...day of....., 188..

.....
Justice of the Peace (or Police Justice).

No. 175.

Warrant under laws to prevent prize fights, cruelty to animals, etc.

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of.....County,

GREETING:

Whereas, has made complaint, under oath, to and before me,....., a police justice [or justice of the peace], in and for the.....; that he has just and reasonable cause to suspect, and does suspect, that certain of the provisions of law relating to and affecting animals, and especially the provisions of the following laws made and passed, to wit: "An act to prevent prize fights and fights among game animals," passed April 4, 1856; and "An act for the more effectual prevention of cruelty to animals," passed April 12, 1867; and "An act relating to animals," passed February 11, 1874, are being and are about to be violated by at and within the particular building and place within the city and county aforesaid, known as..... and now occupied, kept and used by.....

Now, therefore, I,, police justice [or justice of the peace] as aforesaid, do authorize you to enter and search the said building and place within the known as and to arrest the said..... by whatsoever names they may be known or called, or any or either of them there present found violating any of said laws, and to bring such person when so arrested before the nearest magistrate of competent jurisdiction, to be dealt with according to law. Hereof fail not at your peril.

Witness the said in the county aforesaid, theday of.....

A. B.

Police Justice (or Justice of the Peace).

No. 176.

Warrant for seizure of gaming apparatus, etc., under Laws 1851, chapter 504.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the.....

Whereas, Complaint, on oath, has been duly made before me,.....
..... police justice [or justice of the peace] of the.....
that one.....

We, therefore, command you forthwith to arrest the said.....
.....; to make diligent search for such property, tables,
devices or apparatus; and, after demanding entrance, to break open and enter
said house or place, and any house or place wherein such gambling tables,
establishment, devices or apparatus shall be kept, and to seize the aforesaid
gambling tables, establishment, apparatus or devices, and deliver the same to
..... of the..... and to return
this warrant with your doings thereon, indorsed to me, the said.....
..... at the..... in the said.....
or, in case of my absence or inability to act, before the nearest or most acces-
sible magistrate in the county of..... Hereof fail not at your peril.

Witness the said..... at the..... in
the county aforesaid, the..... day of..... 188..

Police Justice (or Justice of the Peace).

No. 177.

*Warrant for refusing or neglecting to obey subpoena, under Code of Criminal
Procedure, §§ 619, 952; Code of Civil Procedure, §§ 8, 9, 10, 2870-2874.*

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff of the county of....., and to any constable, marshal or
policeman in the....., and to the keeper of the common jail of
the county of.....

We command you and each of you that you attach.....
and..... forthwith bring before our said..... court, in and
for the..... at the....., then and there to answer for a certain
contempt in refusing or neglecting to attend the said court and give evidence
before the said court, in obedience to a subpoena duly served on.....
as a witness on behalf of the..... concerning a certain.....
pending in said court against..... for..... and have
you then and there this writ. And you are further commanded to detain
..... in custody until discharged by our said court.

Witness,....., Esquire, one of the police justice [or justices
of the peace] of the..... this..... day of.....

Police Justice (or Justice of the Peace).

No. 178.

Warrant for habitual criminal, under Code of Criminal Procedure, § 512, subdivision 1, and § 899, subdivision 9.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the county of

Whereas, Complaint has this day been made by of the of on oath, before, one of the justices of the peace of the [or police justice] of the said city, that on the day of 188.. at the in said county, one who is an habitual criminal, was found in possession of a deadly weapon, and in possession of a tool, instrument or material adapted to and used by criminals for the commission of crime, without being able to account therefor to the satisfaction of the said justice, against the peace of the people of the State of New York, and the form of the statute in such case provided; we therefore command you forthwith to take the body of the said, and bring h. . before the said, at the court-room, in the said, with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said, at the in the county aforesaid, the day of

.....
Justice of the Peace (or Police Justice).

No. 179.

Warrant for habitual criminal, under Code of Criminal Procedure, § 512, subdivision 2, and § 899, subdivision 9.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of

Whereas, Complaint has this day been made by of the city of, in the county of, on oath, before, one of the justices of the peace of the [or police justice], of the said, that on the day of, 188.., at the city of, in said county, one, who is an habitual criminal, was found, without being able to account therefor to the satisfaction of said justice, in in said city, under circumstances giving reasonable ground to believe that he was intending and waiting the opportunity to commit some crime, to wit, the crime of, against the peace of the people of the State of New York, and the form of the statute in such case provided; we therefore command you forthwith to

take the body of the said....., and bring him before the said
....., at the court-room, in the said
....., with this warrant, and a return of your doings thereon
indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said at the....., in the county aforesaid,
the day of

.....
Justice of the Peace (or Police Justice).

No. 180.

*Warrant against vagrant, under Code of Criminal Procedure, § 887, and the
various subdivisions thereof.*

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of

*Whereas, Information on oath has this day been made by
of the in said county, before
a justice of the peace [or police justice] of said county, that one
at the of in said county,* is a person who
has no visible means to maintain himself, and wanders about without employ-
ment* [give facts and circumstances justifying issuing warrant], against the
peace of the people of the State of New York and the form of the statute in
such cases provided;*

*We, therefore, command you forthwith to take the body of the said
..... and bring him before
at the court-room in with this warrant and
a return of your doings thereon indorsed, to be dealt with according to law.
Hereof fail not at your peril.*

*Witness the said.....at the.....in the county
aforesaid, the.....day of.....*

A. B.,
Justice of the Peace (or Police Justice).

NOTE—In order to adapt the above form to any of the subdivisions of section 887, insert
between the stars, in the above form, the substance of any particular subdivision as the case
requires.

No. 181.

Warrant as to female under sixteen years of age living in house of prostitution, under Laws 1881, chapter 496, § 3.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the city [or county] of.....

Whereas, Complaint has this day been made by.....
of the....., in the county of....., on oath, before
....., one of the justices of the peace of the.....
and police justice of the said city; that on the.....day of.....
188..at the.....in said county, one.....
a female child, of the age of..... years, is living, detained and kept in
a house and place No.....street,.....for the
purposes of prostitution;

And, Whereas, In the judgment of said justice, said.....
has just and reasonable cause to suspect that said child is so living, detained
and kept as aforesaid, against the peace of the people of the state of New
York and the form of the statute in such case provided;

We therefore command you forthwith to enter and search said house and
place, and bring said child, together with all persons occupying said house or
place or in charge thereof, before the said.....at the
.....court-room, in the:.....with this warrant, and a
return of your doings thereon indorsed, to be dealt with according to law.
Hereof fail not at your peril.

Witness, the said.....in the county aforesaid, the.....
day of.....

.....
Justice of the Peace (or Police Justice).

No. 182.

Warrant to commit a vagrant child having parent, guardian or master—Plea of guilty—under Code Criminal Procedure, § 888.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the county of.....
and to the superintendent and principal keeper of the alms-house of the said
county, GREETING:

Whereas, On the..... day of.....
was brought before me,....., one of the justices of
the peace in and for the..... and county of....., charged on

the oath of, which oath was believed by me, with being a vagrant within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that he is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, and was on the day of, 188.., found wandering in the streets in said a truant without any lawful occupation;

And Whereas, The said, on being brought before said justice, was immediately informed by said justice of said charge against h... and of h... right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas,, the parent, guardian or master of said child was duly summoned to attend the examination of said child on said charge;

And Whereas, The said charge was then and there distinctly read and stated to the said, and ..he, the said, having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge in the presence of and before said justice, and of h... said parent, guardian or master;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..he, the said, is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of, 188.., found wandering in the streets in said a truant without any lawful occupation;

And Whereas, After the said complaint was satisfactorily established, the said justice did require the said parent, guardian or master to enter into an engagement in writing to the that he would restrain said child from so wandering about; would keep h... in his own premises or in some lawful occupation, and would cause h... to be sent to some school at least four months in each year, until ..he becomes fourteen years old. And the said parent, guardian or master having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the said should be committed to the alms-house of said county, there being no other place provided for h... reception.

Now, therefore, you the said sheriff, constable, marshal or policeman are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody in the said alms-house, and there safely keep until ..he shall be discharged according to law.

Given under my hand, at the city of Albany aforesaid, this day of, 188..

.....,

Justice of the Peace (or Police Justice).

No. 183

Warrant to commit vagrant child having parent, guardian or master — Plea not guilty — under Code of Criminal Procedure, § 888.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

*To any sheriff, constable, marshal or policeman of the county of.....
and to the superintendent and principal keeper of the alms-house of the said
county, GREETING:*

*Whereas, On theday of.....was brought
before me.....one of the justices of the peace in and for the
.....or police justice of said.....charged on the oath
of.....which oath was believed by me, the said justice,
with being a vagrant, within the intent and meaning of the statute and sub-
division 8 of section 887 of the Code of Criminal Procedure, in that..he is a
child of the age of.....years, having sufficient bodily health and
mental capacity to attend the public schools, and was on the.....day of
.....188..found wandering in the streets in.....
a truant, without any lawful occupation;*

*And Whereas, Said.....on being brought before said
justice, was immediately informed by said justice of said charge against h...
and of h...right to the aid of counsel in every stage of the proceedings, and
before any further proceedings were had;*

*And Whereas,.....the parent, guardian or master of said
.....was duly summoned to attend the examination of
said.....on said charge;*

*And Whereas, The said charge was then and there distinctly read and stated
to the said.....who then and there pleaded not guilty
thereto, who was then and there tried upon the said charge by the said justice,
who did thereupon hear testimony on oath in support of said charge, and in
defense thereof, and on behalf of said person;*

*And Whereas, The said testimony was given and evidence was had in the
presence and hearing of the said.....and.....
said parent, guardian or master, ..he the said.....
having previously thereto been allowed a reasonable time to send for and
advise with counsel;*

*And whereupon, the said justice did thereupon adjudge and determine
that the said.....was guilty of the aforesaid charge,
and the said.....was thereupon convicted of the offense
aforesaid, to wit, of being a vagrant, in that ..he, the said.....
is a child of the age of.....years, having sufficient bodily health
and mental capacity to attend the public schools, was on the.....day of
.....188..found wandering in the streets in said.....
a truant, without any lawful occupation;*

*And Whereas, After the said complaint was satisfactorily established, the
said justice did require the said parent, guardian or master to enter into an
engagement in writing to the.....that ..he would restrain said*

child from so wandering about; would keep h....in h....own premises or in some lawful occupation, and would cause h....to be sent to some school at least four months in each year, until ..he becomes fourteen years old; and the said parent, guardian or master having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the saidshould be committed to the alms-house of said county, there being no other place provided for h.. reception;

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said..... into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said.....into your custody, in the said alms-house, and there safely keep h....until ..he shall be discharged according to law.

Given under my hand, at theaforesaid, this.....day of....

.....
Justice of the Peace (or Police Justice).

No. 184.

Warrant to commit vagrant child having no parent, guardian or master—Plea of guilty—under Code of Criminal Procedure, § 888.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, marshal or policeman of the county of, and to the superintendent and principal keeper of the alms-house of the said county,
GREETING:

Whereas, On theday ofwas brought before me,, one of the justices of the peace in and for the, or police justice of said..... charged on the oath of, which oath was believed by me, the said justice, with being a vagrant within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that ..he is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, and was, on the..... day of 188., found wandering in the streets in said..... a truant without any lawful occupation;

And Whereas, Said..... has no parent, guardian or master, or no parent, guardian or master can be found;

And Whereas, Said..... on being brought before said justice, was immediately informed by said justice of said charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, The said charge was then and there distinctly read and stated

to the said, who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person;

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said, he the said having previously thereto been allowed a reasonable time to send for and advise with counsel;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that . . he the said is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of found wandering in the streets in said, a truant without any lawful occupation, it was adjudged and determined by me that the said should be committed to the alms-house of said county, there being no other place provided for his reception;

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you the said superintendent and principal keeper are hereby commanded to receive the said into your custody, in the said alms-house, and there safely keep, or until . . he shall be discharged according to law.

Given under my hand, at the aforesaid, this day of

Justice of the Peace (or Police Justice).

No. 185.

Warrant to commit vagrant child having no parent, guardian or master — Plea of guilty — under Code of Criminal Procedure, § 888.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the county of, and to the superintendent and principal keeper of the alms-house of the said county,

GREETING:

Whereas, On the day of was brought before me,, one of the justices of the peace in and for the [or police justice], of said city, charged on the oath of, which oath was believed by me, with being a vagrant, within the intent and meaning of the statute, and subdivision 8 of section 887 of the Code of Criminal Procedure, in that . . he is a child of the age of years, having sufficient bodily health and mental capacity to

attend the public schools, and was, on the day of 188.., found wandering in the streets in said, a truant, without any lawful occupation;

And Whereas, Said has no parent, guardian or master, or no parent, guardian or master can be found;

And Whereas, Said....., on being brought before said justice, was immediately informed by the said justice of said charge against h.., and of h.. right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, The said charge was then and there distinctly read and stated to the said, and ..he, the said, having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..he, the said, is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of 188.., found wandering in the streets in said, a truant, without any lawful occupation, it was adjudged and determined by said justice that the said should be committed to the alms-house of said county, there being no other place provided for h.. reception;

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house, and ..he there safely kept until ..he shall be discharged according to law.

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 186.

Warrant to commit a child found begging — Plea of guilty — under Code Criminal Procedure, § 893.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of, and to the superintendent and principal keeper of the alms-house of the said county,

GREETING:

Whereas, On the day of..... was brought before me,, one of the justices of the

peace in and for the....., or police justice of said city, charged on the oath of which oath was believed by me, the said justice, with being a child of the age of years, who was on the day of found begging for alms, and soliciting charity from door to door in said, and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit.....

And, Whereas, The said justice immediately and before any further proceedings were had informed the said of the charge against h..., and of h... right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and he, the said was given a reasonable time to send for and advise with counsel.

And, Whereas, He, the said, did then and there plead guilty to the said charge, and in the presence of the said court.

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a child of the age of years, who was, on the day of, 188., found begging for alms and soliciting charity from door to door, in said....., and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit.....

And it was adjudged and determined by me that the said..... should be committed to the alm-house of said , to be kept employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper are hereby commanded to receive the said into your custody, in the said alms-house, and keep h... employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Given under my hand, at the aforesaid, this day of

.....

Justice of the Peace (or Police Justice).

No. 187.

Warrant to commit a child found begging—Plea of not guilty—under Code of Criminal Procedure, § 893.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of....., and to the superintendent and principal keeper of the alms-house of the said county,
GREETING:

Whereas, On the.....day of....., was brought before me....., one of the justices of the peace in and for the....., or police justice of said city, charged on the oath of....., which oath was believed by me, the said justice, with being a child of the age of..... years, who was, on the.....day of....., 188., found begging for alms and soliciting charity from door to door in said..... and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit:

And, Whereas, The said justice, immediately and before any further proceedings were had, informed the said..... of the charge against him, and of his right to the aid of counsel in every stage of the proceedings; and the said charge was then and there distinctly read and stated to the said....., who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person.

And, Whereas, The said testimony was given, and evidence was had in the presence and hearing of the said..... he, the said....., having previously thereto been allowed a reasonable time to send for and advise with counsel.

And whereupon the said justice did thereupon adjudge and determine that the said..... was guilty of the aforesaid charge, and the said..... was thereupon convicted of the charge aforesaid, to wit: of being a child of the age of..... years, who was, on the.....day of....., 188., found begging for alms and soliciting charity from door to door in said....., and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit: and it was adjudged and determined by me that the said..... should be committed to the alms-house of the said....., to be kept employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said..... into the custody of the said superintendent and principal keeper of the said

alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house, and keep h... employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Given under my hand, at.....aforesaid, this....day of....., 188..

.....

Justice of the Peace (or Police Justice).

No. 188.

Warrant to commit a vagrant on plea of guilty, under Code Criminal Procedure, § 892.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the, and to the superintendent and principal keeper of the alms-house or penitentiary of the said county, GREETING:

Whereas, has this day been duly examined, tried and convicted before me,, one of the justices of the peace in and for the and county of and police justice of said city, upon the complaint on oath of of being, at the aforesaid, on this present day, a vagrant, for that the said, at the aforesaid, on this present day, is a person who, not having visible means to maintain h....., lives without employment;

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against h..., and of h... right to the aid of counsel in every stage of the proceedings, and the said charge was distinctly read and stated to the said, and ..he, the said was given a reasonable time to send for and advise with counsel;

And Whereas, ..he, the said did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that ..he, the said, was and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said, who is not a notorious offender, and is a proper object for such relief, should be committed to the alms-house, or being a notorious offender, and an improper person to be sent to the alms-house, should be committed to and confined in the alms-house or penitentiary of said county for the term of at hard labor.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said

alms-house or penitentiary. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house or penitentiary, for the term of at hard labor, and h... there safely keep until the expiration of the said

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 189.

Warrant to commit a vagrant after trial — Plea of not guilty — under Code of Criminal Procedure, § 892.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of....., and to the superintendent and principal keeper of the alms-house and penitentiary of the said county, GREETING:

Whereas, On the day of,
was brought before me,, one of the justices of the peace in and for the and county of or police justice of said, charged on the oath of, which oath was believed by me, the said justice, with, on this present day, at the.....
....., and being a vagrant within the intent and meaning of the statute;

And Whereas, The said justice, immediately and before any further proceedings were had, informed the said of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person;

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said, he, the said, having previously thereto been allowed a reasonable time to send for and advise with counsel;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that, the said, on this present day, at the city of, aforesaid, was and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said,

who is not a notorious offender, should be committed to the alms-house of the said county of, or being a notorious offender and improper person to be sent to the alms-house, should be committed to and confined in the alms-house or penitentiary of said county for the term of at hard labor;

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house or penitentiary. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house or penitentiary, for the term of, at hard labor, and there safely keep until the expiration of the said

Given under my hand, at the aforesaid, this day of

Justice of the Peace (or Police Justice).

No. 190.

Warrant to commit disorderly person for not giving security to support his wife and children, etc.—Plea of guilty—under Code of Criminal Procedure, § 908.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
To any constable, marshal or policeman in the county of, and to the sheriff of the said county:

Whereas, On the day of, was brought before me,, one of the justices of the peace in and for the ... and county of or police justice of said city, charged upon the complaint on the oath of with having, on the day of, 188., at the aforesaid, been a disorderly person, for that the said

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and he the said was given a reasonable time to send for and advise with counsel;

And Whereas, He, the said did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that he, the said at the aforesaid, on the day of 188., did

And Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the

said was thereupon convicted of the offense aforesaid, of being a disorderly person, in that he, the said at the aforesaid, on the day of 188..., did

And Whereas, Prior to such conviction, the said was required to give security by a written undertaking, with..... suret.....in the sum of hundred dollars, that he would support his wife and children, and would indemnify the against their becoming, within one year, chargeable upon the public; and inasmuch as the said has not given the said undertaking required as aforesaid, the said was, by the said justice, convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed by him with his name of office, and immediately filed in the office of the clerk of the county of a record of such conviction of the said.....

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said ... into the custody of the said sheriff. And you, the said sheriff, are hereby commanded to receive the said into your custody in the county jail of said county, and there safely keep him in said county jail for the term of at hard labor, or until he give the said security required as aforesaid.

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 191.

Warrant to commit a disorderly person for not giving security to support his wife and children, etc.—Plea of not guilty—under Code Criminal Procedure, § 903.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable, marshal or policeman in the county of and to the sheriff of the said county :

Whereas, On the.....day of..... was brought before me, ... one of the justices of the peace, in and for the and county of....., and police justice of said city, charged upon the complaint, on oath, of..... with having on.....day of....., at the..... aforesaid, been a disorderly person, for that the said.....

And, Whereas, The said justice immediately, and before any further proceedings were had, informed the said.....of the charges against him and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, who then and there pleaded not guilty

thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of the said.....

And, Whereas, The said testimony was given and evidence had in the presence and hearing of the said he, the said having previously thereto been allowed a reasonable time to send for and advise with counsel;

And, Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said..... was thereupon duly convicted of the offense aforesaid, to wit, of being a disorderly person, in that the said..... at the aforesaid on the said..... day of..... did

And, Whereas, Prior to such conviction, the said was required to give security by a written undertaking with ... suret..., in the sum of hundred dollars; that he would support his wife and children, and would indemnify the against their becoming within one year chargeable upon the public; and inasmuch as the said did not give the said undertaking required as aforesaid, the said was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed by him with his name of office, and immediately filed in the office of the clerk of the county of a record of such conviction of the said.....

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said..... into the custody of the said sheriff; and you, the said sheriff, are hereby commanded to receive the said..... into your custody in the county of said county, and there safely keep him in said county jail for the term of hard labor, or until he give the said security required as aforesaid.

Given, under my hand, at the.....aforesaid, this....day of.....

.....
Justice of the Peace (or Police Justice).

No. 192.

Warrant to commit a disorderly person for not giving security for good behavior after a plea of guilty, under Code of Criminal Procedure, §§ 901, 908.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To any constable, marshal or policeman in the county of, and to the sheriff of the county of, GREETING:

Whereas, On the day of, was brought before me,, one of the justices of the

peace in and for the, and county of or police justice of the said city, charged upon the complaint on the oath of, with having, on the ... day of, at the aforesaid, been a disorderly person, for that the said

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against h, and of h right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and .. he, the said, was given a reasonable time to send for and advise with counsel;

And Whereas, He, the said, did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that .. he, the said, at the aforesaid, on the day of did

And Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, of being a disorderly person, in that .. he, the said, at the city of aforesaid, on the day of, 188..., did

And Whereas, Prior to such conviction the said was required to give security by a written undertaking with suret ..., in the sum of hundred dollars, for h .. good behavior for the space of one year, and inasmuch as the said did not give the said undertaking required as aforesaid, the said was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed and immediately filed in the office of the clerk of the county of a record of such conviction of the said

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said into the custody of the said sheriff. And you, the said sheriff, are hereby commanded to receive the said ... into your custody in the county jail of said county, and there h .. safely keep in said county jail, for the term of, at hard labor, or until .. he give the said security required as aforesaid.

Given under my hand, at the .. aforesaid, this day of, 188 ..

.....
Police Justice (or Justice of the Peace).

No. 193.

Warrant to commit a disorderly person for not giving security for good behavior after a plea of not guilty, under Code of Criminal Procedure, §§ 901, 903.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To any constable, marshal or policeman in the county of..... and to the sheriff of the said county, GREETING:

Whereas, On the.....day of, was brought before me,one of the justices of the peace in and for theand county ofpolice justice of said city, charged upon the complaint on oath of with having, on the.....day of..... at the city ofaforesaid, been a.....

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said.....of the charge against h...and of h...right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of the said.....

And Whereas, The said testimony was given and evidence had in the presence and hearing of the said.....he, the saidhaving previously thereto been allowed a reasonable time to send for and advise with counsel;

And Whereas, The said justice did thereupon adjudge and determine that the said.....was guilty of the aforesaid charge, and the said.....was thereupon duly convicted of the offense aforesaid, to wit, of being a disorderly person, in that the saidat the.....aforesaid, on the saidday of.....did.....

And Whereas, Prior to such conviction the saidwas required to give security by a written undertaking withsuret.....in the sum of.....hundred dollars, for h....good behavior for the space of one year, and inasmuch as the saiddid not give the said undertaking required as aforesaid, the said.....was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed and immediately filed in the office of the clerk of the county of.....a record of such conviction of the said

These are, therefore, to command you, the said constable, marshal or policeman forthwith to carry and deliver the saidinto the custody of the said sheriff. And you, the said sheriff, are hereby commanded to receive the saidinto your custody in the county jail of said county, and there h....safely keep in said

county jail, for the term ofat hard labor, or until
..he give the said security required as aforesaid.

Given under my hand, at the.... aforesaid, this....
day of.....

.....

Police Justice (or Justice of the Peace).

No. 194.

Warrant for felony, under Code of Criminal Procedure, §§ 151-154.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of.....

Information, upon oath, having been this day laid before me, that the crime
of.....has been committed, and accusing.....thereof.

You are therefore commanded forthwith to arrest the above-named
.....
and bring h... before me at the.....court in the said county of
....., or, in case of my absence or inability to act, before the
nearest or most accessible magistrate in this county.

Dated at....., this.....day of....., 188..

.....

Justice of the Peace (or Police Justice).

No. 195.

*Affidavit proving handwriting of justice who issued warrant to be executed in
another county, under Code of Criminal Procedure, § 157.*

STATE OF..... } ss. :
COUNTY OF.....

....., being duly sworn, says that he resides in the
city of Albany; that the name of....., purporting
to be signed to the above warrant, is the handwriting of.....,
who is one of the police justices and justices of the peace of the
in the county of....., by whom the above warrant was issued.

Sworn before me, this....day }
of.....188.. }

.....

.....

No. 196.

Return to warrant for felony.

By virtue of the within warrant I have arrested the within named, and now have him before the magistrate by whom this warrant was issued, or before being the nearest or most accessible magistrate in the county of....., the magistrate by whom this warrant was issued being absent or unable to act.

Dated at....., this.....day of....., 188..

A. B.,
Constable (or other officer).

No. 197.

Commitment on warrant for felony, under Code of Criminal Procedure, § 193.

The within named..... having been brought before me under this warrant, is hereby committed for examination to the sheriff of the county of.....

.....
Justice of the Peace (or Police Justice).

No. 198.

Permission to execute warrant in another county, under Code of Criminal Procedure, § 156.

The within warrant may be executed in the county of.....

Dated at..... this..... day of..... 188.

A. B.,
Justice of the Peace (or Police Justice).

No. 199.

Warrant of arrest for misdemeanor, under Code of Criminal Procedure, § 157.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF..... } ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the county of.....

Information upon oath having been this day laid before me that the crime of..... has been committed, and accusing thereof,

You are therefore commanded forthwith to arrest the above named..... and bring h.. before me at the..... court, in the..... in the said county of..... or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at..... this..... day of..... 188.

.....
Justice of the Peace (or Police Justice).

No. 200.

Permission to execute warrant for misdemeanor on Sunday or in night-time, under Code of Criminal Procedure, § 170.

I do hereby order and direct that the arrest on the within warrant may be made on Sunday or at night.

A. B.,

Justice of the Peace (or Police Justice).

No. 201.

Warrant to commit child under sixteen years — Plea of not guilty — under Laws 1881, chapter 496.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

*To any sheriff, constable, marshal or policeman in the county of
and to the superintendent of the House of Refuge for the Reformation of
Juvenile Delinquents in the city of New York, GREETING:*

*Whereas, On the day of 188.,
was brought before me,, one of the justices of the
peace in and for the city and county of, or police justice of said
city, charged on the oath of, which oath was believed
by me, the said justice, with, on this present day, at the.....
.....*

*And Whereas, The said justice, immediately and before any further pro-
ceedings were had, informed the said of the charge
against him, and of his right to the aid of counsel in every stage of the
proceedings, and the said charge was then and there distinctly read and stated
to the said, who then and there pleaded not guilty
thereto, who was then and there tried upon the said charge by the said justice,
who did thereupon hear testimony on oath in support of said charge, and in
defense thereof, and on behalf of said person;*

*And Whereas, The said testimony was given and evidence was had in the
presence and hearing of the said, he, the said
..... having previously thereto been allowed a reasonable
time to send for and advise with counsel;*

*And Whereas, It was ascertained by said justice that said
was years old on the day of*

*And whereupon the said justice did thereupon adjudge and determine that
the said was guilty of the aforesaid charge and offense,
and the said was thereupon convicted of the charge
and offense aforesaid, and it was adjudged and determined by me that the
said should be committed to and confined in the
House of Refuge for the Reformation of Juvenile Delinquents in the city of
New York, until he should be thence discharged according to law.*

Now, therefore, you the said sheriff, constable, marshal or policeman, are

commanded forthwith to convey and deliver the said into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said into your custody, in the said House of Refuge, and there safely keep until he shall be thence discharged according to law.

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 202.

Warrant against child begging, under Code of Criminal Procedure, § 893.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in the city and county of.....

Whereas, Complaint has this day been made by of the in the county of, on oath, before..... one of the justices of the peace of the or police justice of the said city; that on the day of, at the in said county, one, a child of the age of years, was found begging for alms and soliciting charity from door to door, and was found begging for alms and soliciting charity in a street, highway and public place in said city, to wit: against the peace of the people of the State of New York and the form of the statute in such case provided.

We, therefore, command you forthwith to take the body of the said and bring h .. before the said, at the court room, in the said, with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said, at the, in the county aforesaid, the day of

.....
Justice of the Peace (or Police Justice).

No. 203.

Warrant of commitment for being intoxicated in a public place

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, { ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of the said county, and to the superintendent of the penitentiary of the said county, GREETING:

Whereas, ... has this day been duly examined, tried and convicted before me, ..., one of the justices of the peace in and for the ... county of ..., police justice of said ..., upon the information on oath of ..., and on competent testimony, of having been intoxicated in a public street or place in said ..., contrary to the provisions of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, and the act amendatory thereof, passed May 11, 1869;

And Whereas, Upon such conviction, I did adjudge and determine that the said ... should pay a fine of ... dollars, and two dollars costs, and in default thereof that ... be committed to the penitentiary of said county for the term of ... days, unless the fine be sooner paid;

These are, therefore, to command you, the said sheriff, constable, marshal or policeman, forthwith to convey and deliver the said ... to the said superintendent of the said penitentiary. And you, the said superintendent, are hereby commanded to receive the said ... into your custody, in the said penitentiary, and h... there safely keep until the expiration of the said ... days, unless the fine be sooner paid, or ... be thence discharged in due course of law.

Given under my hand, at ... the ... day of ...

.....
Police Justice (or Justice of the Peace).

No. 204.

Statement and questions put to defendant by justice, under Code of Criminal Procedure, §§ 188, 189.

JUSTICES' COURT (OR OTHER COURT).

Before....., Justice,, 1882.

THE PEOPLE
against
JOHN DOE.

The defendant, immediately on being brought before said justice, was informed by said justice as follows:

You are charged with the crime of.....

You have the right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Question. Do you require counsel? If you do, you will be allowed a reasonable time to send for him, and the examination will be adjourned for that purpose.

Answer.....

[.....appeared as counsel for the defendant, or no counsel appearing, and after waiting a reasonable time therefor, the said justice put the following questions to the defendant]:

Question. Do you desire an examination of this case, or do you waive examination and elect to give bail?

Answer

.....
Police Justice (or Justice of the Peace).

No. 205.

Commitment on charge of intoxication.

POLICE COURT (OR OTHER COURT).

Before....., *Justice.*

STATE OF NEW YORK, } ss.:
COUNTY OF.....

To the Sheriff of the county of Albany:

....., having been brought before me, charged with the offense of public intoxication, of.....
.....
you will receive and safely keep within the common jail of said county for further examination.

Dated at....., this.....day of....., 188..

.....
Justice.

No. 206.

Recognizance of disorderly person, under Code of Civil Procedure, § 899, subdivisions 1 and 2.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

Be it remembered, that on this day of, in the year of our Lord one thousand eight hundred and eighty-....,, of the, in said county, and, both of the same place, personally came before me,, one of the justices of the peace in and for the, or police justice of the said, and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the sum of hundred dollars each, to be levied of their respective goods and chattels,

lands and tenements, to the use of the said people, if default shall be made in the conditions following, viz:

Whereas, On the day of, 188., did make complaint on oath before the said, one of the justices of said, or police justice of the, against, in which complaint the said alleges that the said, and the said justice having caused the said to be brought before him and examined touching the offense in said complaint alleged, and it appearing to the said justice, upon such examination, by the confession of said, and by competent testimony, that was guilty of the offense in said complaint alleged, and was and is a disorderly person, and, for the reasons set forth in said complaint, the said justice did thereupon require the said to enter into a recognizance with suret..., approved by the said justice, in the sum of hundred dollars, that he will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public.

Now, therefore, we hereby undertake that the said will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public, or we will pay to the people of the State of New York the sum of hundred dollars.

Subscribed and acknowledged before }
me, this ... day of 188.. }

.....
.....

No. 207.

Recognizance for support of wife and children of disorderly person, taken after commitment, under Code of Criminal Procedure, § 899, subdivisions 1 and 2.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

Be it remembered, that on this.....day of.....188., of the..... in said county, and..... of the same place, personally came before us,..... and..... two of the justices of the peace [or police justices] of the said... county, and jointly and severally acknowledged themselves to be indebted to the people of the State of New York, in the sum of... hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the conditions following:

Whereas, was on the..... day of..... 188.. duly convicted before justice of the peace [or police justice] of said..... upon the

complaint made before him, and of the offense of being a disorderly person; for that the said

And prior to such conviction the said justice did require of the said that he give security by a written undertaking with suret. . . . in the sum of hundred dollars; that he will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public; and for not giving the said undertaking the said was, by the said justice, convicted of being a disorderly person as aforesaid, and a record of said conviction was duly made by the said justice, and signed by him with his name of office, and filed in the office of the clerk of the county of and said was, by a warrant signed by the said justice, with his name of office, committed to the county jail of the county of for the term of at hard labor, or until he gives the said undertaking required as aforesaid, and still remains in the county jail of said county; and application having been made to us, the said two justices, to take such undertakings so as aforesaid required of and in behalf of the said

Now, therefore, we hereby undertake that if the said will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public, or we will pay to the people of the State of New York the said sum of hundred dollars.

Subscribed and acknowledged before us the }
day and year first above written. }

Justice of the Peace (or Police Justice).

No. 208.

Recognizance for good behavior of disorderly person, under Code of Criminal Procedure, § 899, subdivisions 3, 9.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF }

Be it remembered, that on this day of in the year of our Lord one thousand eight hundred and eighty- of the in said county, and both of the same place, personally came before me one of the justices of the peace in and for the or police justices of the said and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the sum of hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people if default shall be made in the conditions following, viz.:

Whereas, On the day of, 188 did make complaint on oath before the said one of the justices of said or police justice of the, against

.....in which complaint the said.....alleges
 that the said.....
 and the said justice having caused the said.....to be brought
 before him and examined touching the offense in said complaint alleged, and
 it appearing to the said justice upon such examination, and by competent
 testimony, that.....was guilty of the offense in said complaint
 alleged, and was and is a disorderly person, and, for the reasons set forth in
 said complaint, the said justice did thereupon require the said.....
 to enter into a recognizance with.....suret....in the sum of.....
 hundred dollars, for the good behavior of the said.....
 for the space of one year.

Now, therefore, we hereby undertake that the said.....will
 be of good behavior for the space of one year next ensuing the date hereof,
 and not be guilty of the acts set forth in said complaint, or we will pay to the
 people of the State of New York, the sum of.....hundred dollars.

Subscribed and acknowledged before me, }
 this.....day of.....188... }

No. 209.

Recognizance for good behavior of disorderly person — taken after commitment.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

Be it remembered, that on this..... day of 188..
 of the..... in said county, and of the same place, per-
 sonally came before us..... of the same.....
 and..... two of the justices of the peace [or police justices]
 of the said..... and county, and jointly and severally acknowledged
 themselves to be indebted to the people of the State of New York, in manner
 following, in the sum of hundred dollars, to be levied of their
 respective goods and chattels, lands and tenements, to the use of the said
 people, if default shall be made in the condition following:

Whereas..... was on the day of 188.. duly
 convicted before..... justice of the peace [or police justice] of
 said..... upon the complaint made before him, of the offense of being
 a disorderly person; for that the said.....

And prior to such conviction the said justice did require of the said
 that ..he give security by a written undertaking with.....suret... approved
 by him, in the sum of..... hundred dollars for h... good behavior for the
 nce of one year; and not giving the said undertaking the said.....
 was by the said justice convicted of being a disorderly person as aforesaid,
 and a record of said conviction was duly made by the said justice, and signed
 by him with his name of office, and filed in the office of the clerk of the

county of..... and said..... was, by a warrant signed by the said justice, with his name of office, committed to the county jail of the said county of..... for the term of..... at hard labor, or until he give the said security required as aforesaid, and still remains in the county jail of said county; and application having been made to us, the said two justices, to take such undertaking so as aforesaid required of and on behalf of the said.....

Now, therefore, we hereby undertake that the said will be of good behavior for the space of one year from the time of the said conviction, and shall not, during such time, be guilty of any of the acts ..he was so as aforesaid convicted of being a disorderly person, or we will pay to the people of the State of New York, the said sum of..... hundred dollars.

Subscribed and acknowledged before, us the }
day and year first above written. }

.....
Justices of the Peace (or Police Justice).

No. 210.

Bill of exceptions, under Code Criminal Procedure, § 455.

COURT OF OYER AND TERMINER — COUNTY.

THE PEOPLE
against

At a court of oyer and terminer, held in and for the county of at the court-house in the, before Hon., a justice of the supreme court, on the day of, an indictment against of which the annexed marked "A" is a copy, came on to be tried, and a jury having been impaneled and sworn, the following testimony was then had, and the following proceedings were then and there had, to wit:

John Doe, a witness on behalf of the people, being duly sworn, testified as follows:

[Insert all testimony and exceptions.]

The evidence here closed, and the above was all the evidence taken on said trial.

The court charged the jury, among other things, that [insert that part of the charge objected to], to which portion of the charge the counsel for the prisoner duly excepted.

And the counsel for the prisoner thereupon requested the court to charge the jury as follows: [Insert request to charge.] The court refused so to charge, and the counsel for the prisoner then and there excepted.

The said cause was on the said day of submitted to the jury, who, on the same day, returned into court and rendered their verdict, by which they found the said defendant guilty of the crime charged in the indictment.

And because none of the said exceptions so offered and made do appear upon the record of said trial, therefore, in the presence of the defendant, the said court has signed the said exceptions according to the statute in such case made and provided.

Dated this day of

A. B.,

Justice Supreme Court.

B. C., *Attorney for Defendant.*

"A."

At a court of oyer and terminer, held at the court-house, in the.....
on the day of.....

This schedule consists of a copy of the indictment which should be attached to the bill of exceptions, and reference thereto made in the bill itself.

No. 211.

Notice to settle bill of exceptions, under Code Criminal Procedure, § 458.

COURT OF OYER AND TERMINER—..... COUNTY.

THE PEOPLE
against

}

SIR.—Please to take notice that on the bill of exceptions served on you herein, and upon the amendments thereto served by you, the defendant herein,, will make a motion before Hon. at his chambers, in the city of, on the..... day of..... at 10 o'clock A. M. of that day, to have the said bill of exceptions settled, and for such other relief as may be just.

Dated at this..... day of

Yours, etc.,

A. B.,

Defendant's Attorney.

To B. C., *District Attorney.....county.*

No. 212.

Order enlarging time to settle bill of exceptions, under Code Criminal Procedure, § 460.

(Title of cause and court.)

On reading and filing affidavit of....., defendant's attorney, hereto annexed, and, on motion of the same, it is hereby ordered, on good cause shown, that defendant's time for preparing and serving a bill of exceptions be and is hereby extended to and including....., 1882.

Dated this.....day of... ..

A. B.,

Justice Supreme Court.

No. 213.

Affidavit for new trial, under Code Criminal Procedure, § 465, subdivision 7.

COURT OF OYER AND TERMINER.

THE PEOPLE
against

STATE OF NEW YORK, } ss.:
COUNTY OF }

....., being duly sworn, says that he resides at, in said county; that he is the attorney for the above named defendant, and as such attorney tried his case under the indictment charging him with arson at the present term of this court, at which he was found guilty by a jury as charged in said indictment. Deponent further says that since said trial closed he has discovered such new evidence as, in his judgment, if produced and received before, would have changed the verdict to one of acquittal; that said evidence is in substance as follows: [here give nature of the evidence briefly]; that said evidence was wholly unknown to him and this deponent at the trial just had, and that their failure to produce it was not owing to any want of diligence on their part.

Subscribed and sworn before me, }
this day of 1883. }

No. 214.

Affidavit on motion for arrest of judgment, under Code Criminal Procedure, § 469.

(Title of court and case.)

STATE OF NEW YORK, } ss.:
..... COUNTY. }

...., being duly sworn, says that he resides at, in said county; that he is the attorney for, the defendant in this action; that said was tried on an indictment charging him with arson, before this court and a jury, on the and was found guilty by said jury as charged on the same day.

Deponent further says that said indictment does not conform to the requirements of sections 275 and 276 of the Code of Criminal Procedure in the following particulars: [state in what it is defective]; and also that the facts therein charged do not constitute a crime.

Subscribed and sworn before me, }
this day of }

No. 215.

Notice to district attorney of motion in arrest of judgment.

(Title of court and cause.)

SIR— Please to take notice that on the indictment herein, on the evidence taken in the trial of this action, on the annexed affidavit, and upon all other proceedings heretofore had in this case, I will move the court on the day of for an order arresting judgment against said defendant, and for such other relief as may be just.

Dated at this day of

Yours, etc.,

A. B.,

*Attorney for Defendant.*To B. C., *District Attorney*, *County*.

No. 216.

Bench warrant after conviction, under Code Criminal Procedure, § 477.

STATE OF NEW YORK, } ss.:
 COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

[SEAL.] *To any sheriff, constable, marshal or policeman of this State:*

A. B. having been on the day of duly convicted in the court of of the county of, of the crime of [designating it];

You are therefore commanded forthwith to arrest the above-named A. B., and bring him before that court for judgment; or, if the court have adjourned for the term, you are to deliver him into the custody of the sheriff of the county of, or in the city and county of New York to the keeper of the city prison of the city of New York.

Dated at this day of

By order of the court.

E. F., *Clerk*.

No. 217.

Warrant of commitment after conviction, under Code of Criminal Procedure, § 487.

(Title of Court.)

STATE OF NEW YORK, } ss.:
 COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff of the county of and to the keeper of the jail or prison to which the prisoner is sentenced:

Whereas, was on the day of, duly tried before me and a jury, and by said jury was convicted of the crime of and afterwards was, by me, in due form of law, sentenced to

imprisonment in the county jail for the term of one year [or fine and imprisonment, as the case may be]. Now, this is to command you to receive the said into your custody and detain him until the judgment of the said court is satisfied.

Dated this day of 188..

A. B.,
Justice Supreme Court (or other court.),

No. 218.

Death warrant, under Code of Criminal Procedure, § 491.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

To the sheriff of the county of.....in the State of New York:

Whereas, At a court of oyer and terminer, held in and for the county of at the court-house, at.....in said county, on the.....day of....., John Doe received sentence of death for the offense of having murdered..... in said indictment mentioned, and having, on the.....day of..... been found guilty of said offense by the verdict of a jury.

Now, it is hereby ordered that execution of the said sentence be made upon him, the said....., on Friday, the.....day of between the hours of ten o'clock, A. M., and three o'clock P. M., of that day, by hanging the said..... by the neck until he be dead, within the walls of the prison of the said county of.....

Given under my hand and seal, this.....day of

[L. S.]

A. B.,
Justice Supreme Court.

No. 219.

Certificate of execution.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

We, the sheriff of county, and other public officers and persons required by law to be present, and whose names are hereto subscribed, do certify that who was sentenced by the court of oyer and terminer, held in and for the county of, on the day of to be executed this day, between the hours of ten o'clock A. M. and three o'clock P. M., was at the time mentioned executed by hanging by the neck until he was dead, within the walls of the prison of said county; and we, the undersigned, do certify that we witnessed the execution, and that the same was conducted and performed in conformity to the provisions

of the law of this State concerning capital punishment, and of the said sentence.

Dated this day of, 188..

.....
Sheriff.

.....
County Judge.

.....
District Attorney.

.....
Surrogate.

No. 220.

Notice of appeal, under Code of Criminal Procedure, § 522.

COURT OF OYER AND TERMINER—COUNTY OF

THE PEOPLE
against

}

To, Clerk and District Attorney of county :

SIRS.—Please to take notice that the defendant herein hereby appeals to the general term of the supreme court from the judgment of conviction rendered against him in this court on the day of 188..

Dated this day of, 188..

A. B.,
Attorney for Defendant.

No. 221.

Notice of appeal by the people, under Code of Criminal Procedure, § 524.

(Title of court and cause as above.)

To....., Defendant, or A. B., Attorney for Defendant :

SIR.—Please to take notice that the people hereby appeal to the general term of the supreme court from the judgment of this court, allowing defendant's demurrer to the indictment, rendered the day of.....

Dated this day of, 188..

A. B.,
District Attorney of County.

No. 222.

Affidavit for publication of notice of appeal, under Code of Criminal Procedure, § 524.

(Title of court and case.)

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he is district attorney of the county of; that at a term of the court of held in and for the county of on the day of 188.., judgment was rendered allowing the demurrer to the indictment interposed by this defendant; that the people have appealed from said judgment; that said defendant cannot be found, after due diligence, so as to make service upon him of the notice of this appeal; that the attorney who acted for the defendant on the argument of said demurrer, does not reside or transact business in the county of

Subscribed and sworn before me, }
this.....day of..... }

No. 223.

Order of publication, under Code of Criminal Procedure, § 524.

(Title of court and names of parties.)

On reading and filing the affidavit of, hereto annexed, and on motion of, district attorney of the county of, it is hereby ordered that the notice of appeal on behalf of the people be served on, the defendant herein, by publishing the same in the a daily paper published at, in the State of New York, for the space of weeks, in each issue thereof.

Dated this day of, 188..

A. B.,
Justice Supreme Court.

No. 224.

Affidavit of publication, under Code of Criminal Procedure, § 525.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he is the publisher and proprietor of the daily, published at that the annexed notice of appeal was published in each issue of said paper for the space of weeks, commencing on the day of.....

Subscribed and sworn before me, }
this.....day of..... }

No. 225.

Certificate of judge that there is reasonable doubt, etc., under Code Criminal Procedure, § 537.

(Title of court and of cause.)

STATE OF NEW YORK, }
COUNTY OF } ss.

I,, who presided at the trial of, the above named defendant, on an indictment charging the said with the crime of, and who was convicted of said crime by a jury on said trial, on the day of, 188., do hereby certify that in my opinion there is reasonable doubt whether said judgment should stand.

Dated at this day of, 188..

A. B.,
Justice Supreme Court.

No. 226.

Notice of application for certificate on appeal, under Code Criminal Procedure, § 539.

(Title of court and of case.)

SIR.—Please to take notice that the defendant herein will apply to Hon., the judge who presided at the trial wherein he was convicted of the crime of, for a certificate that there is a reasonable doubt as to whether or not the judgment of said court should stand, pursuant to section 537 of the Code of Criminal Procedure.

Dated at, this day of, 188..

A. B.,
Defendant's Attorney.

To B. C., District Attorney of county.

No. 227.

Notice of argument, under Code Criminal Procedure, § 537.

(Title of court and of case.)

To District Attorney of county:

SIR.—Please to take notice that defendant's appeal in the above entitled action will be brought on for argument before this court at the next general term thereof, to be held at, in the city of, or the day of, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated at, this day of, 188..

Yours, etc.,

A. B.,
Defendant's Attorney.

No. 228.

Order of reversal and ordering a new trial, under Code Criminal Procedure, § 543.

At a general term of the supreme court of the State of New York, held in
and for the judicial district of said State, at, on
the day of

PRESENT — Hon. }
" } *Justices.*
" }

THE PEOPLE
against

This cause having been heretofore, on the day of,
brought on for argument, and after hearing Mr.,
Esq., of counsel for defendant, and, district
attorney of county for the people, and the court having
deliberated thereon,

It is ordered and adjudged that the judgment of conviction in the above
entitled action be reversed [or as the case may be], and that said defendant
..... have a new trial, which is hereby ordered; and
it is further ordered, the proceedings herein be and the same are hereby
remitted to the court of oyer and terminer of county.

A. B., *Clerk.*

No. 229.

*Order of justice as to notice to be served on district attorney on application for
bail, under Code of Criminal Procedure, § 560.*

(Title of court.)

THE PEOPLE
against

An application having been this day made to me by the above-named
defendant for his admission to bail on the charge of,
upon which he has been held by me, .. and the
said defendant having shown good and sufficient reasons for a notice of less
than two days to the district attorney of his application for admission to bail;

I do hereby order that a notice of be served on the
district attorney of county of the application of the
defendant for admission to bail on said charge.

Dated at, this day of, 188..

.....

Police Justice (or Justice of the Peace).

No. 230.

Certificate denying application to bail, under Code of Criminal Procedure,
 §§ 561, 562.

(Title of court.)

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., police justice [or justice of the peace]
 of the, do hereby certify
 that an application was made to me on the day of 188..,
 for the admission to bail of, held by me to
 answer the crime of, and I denied the said
 application.

Dated at, this day of 188..

.....
Police Justice (or Justice of the Peace).

No. 231.

Certificate of granting application to bail, under Code of Criminal Procedure,
 §§ 561, 562.

(Title of court.)

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

I,, police justice [or justice of the peace]
 of the city of, do hereby certify that an application was,
 on the day of, 188.., made to me for the admission
 to bail of, held by me to answer the crime of
, and I did grant the said application and fix
 the sum in which bail may be taken at hundred
 dollars, with suret

Dated at .. this day of 188..

.....
Police Justice (or Justice of the Peace).

No. 232.

Undertaking of bail, under Code of Criminal Procedure, § 568.

(Title of court.)

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

An order having been made on the day of by
 a justice of the peace [or police justice] of
 the town of, that be held to
 answer upon a charge of [stating briefly the nature of the charge], upon
 which he has been duly admitted to bail in the sum of dollars;

We,, defendant [if the defendant] join in the undertaking of [stating his place of residence and occupation] and of by occupation and of by occupation sureties, hereby undertake that the above named shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the process of the court, and if convicted, shall appear for judgment and render himself in execution thereof ; or if he fail to perform either of these conditions, that he will pay to the people of the State of New York the sum of dollars.

Dated at, this day of, 188..

.....
.....

No. 233.

Justification of sureties, under Code of Criminal Procedure, § 572.

STATE OF NEW YORK, } ss.:
COUNTY }

On this day of, 188.., before me, the subscriber, appeared, to me personally known to be the same persons described in and who executed the within undertaking, and severally acknowledged that they executed the same.

.....
Police Justice (or Justice of the Peace).

STATE OF NEW YORK, } ss.:
COUNTY OF }

..... and , being severally sworn, each for himself says, the said, that he is a resident and holder within the of, in the State of New York, and that he is worth the sum of hundred dollars, exclusive of property exempt from execution, and that his property consists of and the said, for himself, says that he is a resident and holder within the of, in the State of New York, and that he is worth the sum of hundred dollars, exclusive of property exempt from execution, and that his property consists of
.....

Subscribed and sworn before me, }
this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 234.

Order allowing or disallowing bail, under Code of Criminal Procedure, § 575.

THE PEOPLE
against

I do hereby the bail given by the defendant in the above action before me, on the day of, 188..

Dated at, this day of, 188..

.....
Justice of the Peace (or Police Justice).

No. 235.

Order for discharge of prisoner on giving bail, under Code Criminal Procedure, § 576.

To the sheriff of the county of

....., who is detained by you on a commitment, to answer a charge for the crime of, having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody.

Dated at this day of, 188..

.....
Police Justice (or Justice of the Peace) of the city of

No. 236.

Undertaking after indictment for misdemeanor, under Code Criminal Procedure, § 581.

..... COURT, }
COUNTY OF } ss.:

An indictment having been found on the day of, 188... in the court of of the, charging with the crime of, and he having been duly admitted to bail in the sum of hundred dollars.

We,, defendant, and, of, in the county of, by occupation a, and ... of, in the county of, by occupation a sureties, hereby undertake that the above named shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and if convicted, shall appear for judgment, and renderself in execution thereof; or if ..h.. fail to perform either of these conditions, that we will pay to the people of the State of New York the sum of hundred dollars.

Dated at, this day of, 188..

.....
(Justification of sureties same as in No. 233.)

No. 237.

Certificate of surrender of bail, under Code of Criminal Procedure, § 590.

STATE OF NEW YORK, } ss.:
COUNTY OF

I hereby certify that, the surety given on the arrest of, charged with the crime of has this day surrendered him, in exoneration of himself as bail, by delivering him into my custody, together with a certified copy of the undertaking given by the said surety.

Dated at this day of, 188..

A. B.,
Sheriff of the County of

No. 238.

Deputation of bail to arrest principal, under Code of Criminal Procedure, § 591.

STATE OF NEW YORK, } ss.:
COUNTY OF

I,, of surety on the undertaking of charged with the crime of, hereby deputize, authorize and empower, in my place and stead,, of the county of, to take, arrest, secure and surrender to the sheriff of the county of, in the State of New York, the said named in the copy of the undertaking hereto annexed, in exoneration and discharge of my undertaking as aforesaid, and to employ such persons and assistance as may be necessary to effect that purpose.

Dated at this day 188..

Witness: B. C.

A. B.

No. 239.

Order remitting forfeiture of bail, under Code of Criminal Procedure, § 597.

At a special term of the county court of the county of ... held at the chambers of Hon., on the day of

Present,, Judge of County.

IN THE MATTER OF THE ESTREATED RECOGNIZANCE }
OF }

On reading and filing the affidavits and notice of motion of said with proof of due service thereof, and after hearing, Esq., in support of said motion, and, district attorney of county, in opposition thereto, it is now, on motion of said, hereby ordered, that the said order estreating the said recognizance and direct-

ing the same to be prosecuted, be vacated and set aside, and that [if action has been begun] the action commenced thereon by the district attorney of said county be discontinued, upon the payment by said of the costs and expenses incurred therein, amounting to the sum of

A. B.,
County Judge.

No. 240.

Similar order entered at same term of court, at which bail was estreated, under Code of Criminal Procedure, § 594.

At a term of the court of sessions, held in and for the county of,
at the court-house in the city of, on the day of

Present — Hon., County Judge.

A. B. }
C. D. } Justices of Sessions.

THE PEOPLE
against

The recognizance of the above-named defendant with, as bail, having been estreated at the present term of the court of sessions of this county, and the said having renewed his bail for his appearance at the next court of sessions, now, on motion of, Esq., counsel for, it is hereby ordered that the order estreating said bail above-mentioned, and any order for the prosecution thereof, be vacated without costs.

A. B.,
Judge of County.

No. 241.

Complaint upon estreated recognizance.

COURT OF OYER AND TERMINER — COUNTY.

THE PEOPLE
against

} Complaint.

The plaintiffs complain against the defendant above-named, and show to the court that on the day of, at, in the State of New York, in said county, a certain indictment was pending undetermined in the court of oyer and terminer, against the said defendant, for arson in the first degree [state the facts and circumstances with particularity]; and thereupon the said defendant personally came before Hon., he being authorized and empowered to lawfully act in the premises, and then and there before the said judge duly entered into a recognizance, by which they and each of them acknowledged themselves indebted to the State of New York in the sum of, which

said recognizance was and is subject to a certain condition, which condition was, that if the said defendant, should personally appear at the next court of, which was to be held in and for the county of, on the day of then and there to answer said indictment, and also to answer what should then and there be charged against him on behalf of said people, and should not depart therefrom until discharged by said court, then the said recognizance should be void, otherwise to remain and be of full force and effect, according to the terms thereof now remaining on record in the office of the clerk of county;

And the said plaintiffs further allege that the said court of, and the term thereof to which the said was recognized by these defendants to appear, was duly held as in said recognizance specified, to wit, on the day of at the court-house in the city of

And the plaintiffs further say that at said term of court, held as aforesaid, the said indictment then and there pending undetermined in said court before the judge thereof, the said failed in the performance of the said recognizance in this, to wit, that the said being then and there called in open court, and during the sitting of said court, on said day of, as aforesaid, did not appear in said court to answer said indictment, but wholly failed and made default; whereupon an order was made and entered by the said court forfeiting the said recognizance, and directing the same to be prosecuted according to law.

And the said plaintiffs further say that the defendants in this action have not paid the said sum of dollars so as aforesaid acknowledged by them to be indebted to the said plaintiffs, nor any part thereof, and the said plaintiffs say that said recognizance remains in full force and effect, and in no manner reversed, vacated or satisfied.

Wherefore the plaintiffs demand judgment against the said defendants for the sum of dollars, besides costs.

A. B.,

District Attorney in and for the County of

COUNTY OF, ss. :

....., being duly sworn, says that he is district attorney of the county of and plaintiffs' attorney in this action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Subscribed and sworn before me, }
this day of }

.....
.....

No. 242.

Order for recommitment after forfeiture of bail, under Code of Criminal Procedure, § 600.

[Name of Court.]

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of this State:

Whereas, It appears to the satisfaction of the court that was indicted by the grand jury of the county of on the day of for the crime of, and was duly recognized to appear at the court of, held in and for the county of, at, on the day of.....

And Whereas, It also appears that he wholly failed and made default in appearing;

Now this is to command you forthwith to arrest the said and to deliver his body to the sheriff of the county of, to be detained until legally discharged.

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 243.

Undertaking of bail upon recommitment, under Code of Criminal Procedure, § 605.

..... COURT, } ss.:
COUNTY OF

An order having been made on the... .. day of.....188.. by the court of..... that..... be admitted to bail in the sum of dollars, in an action pending in that court against him in behalf of the people of the State of New York, upon an..... we defendant..... surety of..... in the county of..... State of New York, by occupation a..... and surety of..... in the county of..... State of New York, by occupation a hereby undertake that the above-named..... shall appear in that or any other court in which his appearance may be lawfully required upon that..... and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof, or if he fail to perform either of these conditions, that we will pay to the people of the State of New York, the sum of dollars.

Dated at... .. this..... day of..... 188..

In the presence of

.....
Police Justice (or Justice of the Peace).

(Justification of sureties as in No. 233.)

No. 244.

Subpoena to investigate whether crime committed, under Laws 1881, chapter 864, § 2.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Having reason to suppose an offense has been committed, and for the purpose of investigating whether it has been committed,

You are commanded to appear before me..... one of the police justices [or justices of the peace] of the..... at the police court room in said city, on the..... day of..... 188.. at o'clock in the noon, as a witness for that purpose.

Dated at..... this..... day of 188..

.....

Police Justice (or Justice of the Peace).

No. 245.

Subpoena duces tecum, under Code of Criminal Procedure, §§ 612, 613.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To.....

You are commanded to appear before..... one of the police justices [or justices of the peace] of the....., at the..... court room in said..... on the..... day of....., 188., at..... o'clock in the..... noon, as a witness in a criminal action prosecuted by the people of the State of New York against..... and you are required also to bring with you the following :

Dated at this day of 188..

.....

Police Justice (or Justice of the Peace).

No. 246.

Subpoena, under Code of Criminal Procedure, § 612.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To.....

You are commanded to appear before..... one of the police justices [or justices of the peace] of the....., at the... court room, in said..... on the..... day of..... 188., at..... o'clock in the..... noon, as a witness in a criminal action prosecuted by the people of the state of New York, against.....

Dated at..... this..... day of 188..

.....

Police Justice (or Justice of the Peace).

No. 247.

Return to the service of subpoena, under Code Criminal Procedure, § 615.

COUNTY OF ss.:

I.....hereby make return that I did on the....day of.....
.....at.....in the county of.....State of New York, serve
the within subpoena on.....by delivering it to and leaving the
same with him.

Dated at.....this.....day of.....188..

A. B.,
Policeman.

No. 248.

Affidavit to obtain order to examine witness conditionally, under Code Criminal Procedure, § 622.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

.....being duly sworn says that he resides at.....
that at the last term of the court of.....in and for the county
of.....he was indicted on a charge of arson; that immediately
after said indictment, he gave bail to appear at the next term of said court to
be held at the court house in theon the....day of.....
That.....who resides at.....in the county of.....
is acquainted with all of the facts of the case, and his evidence is very
material to deponent's defense in this action. That said.....
above named is in such an enfeebled and infirm state of health that there is
great probability that he will be unable, by reason of such infirmities, to attend
the trial of this cause at the time and place above-named or at any subse-
quent time.

Sworn before me, this }
.....day of..... }

No. 249.

Order to examine witness conditionally, under Code Criminal Procedure, § 625.

SUPREME COURT — COUNTY OF

THE PEOPLE
against

On reading and filing the affidavit of the above-named defendant,
hereto annexed, and on motion of... .. Esq., his
attorney, it is hereby ordered that.....to me at
said town of....., on the..... day of.....,
by said....., in assaulting and beating me, and for

which assault and battery I made complaint, on oath, on the.....day of
 , before ... , one of the justices of
 the peace [or other officer], and which said complaint is now pending and
 undetermined; and I desire that no further proceeding be had against said

(Signed)

COUNTY OF....., ss.:

I hereby certify that, on this.....day of....., before me
 personally appeared.....of.....,
 in said county, personally known to me to be the same person mentioned in
 and who executed the foregoing acknowledgment of satisfaction; and he
 acknowledged the execution of the same.

A. B.,
 Justice of the Peace.

No. 250.

*Warrant to discharge defendant from custody when he is imprisoned, under Code
 of Criminal Procedure, § 663.*

....., residing at....., in the county
 of..... be examined conditionally before me on the.....day of
, 188., at the residence of said
 in the county aforesaid; and that a copy of the order and of the annexed
 affidavit be served on the district attorney of the county of.....
 on or before the.....day of.....

Dated at....., this.....day of....., 188..

A. B.,
 Justice Supreme Court.

No. 251.

COMPROMISE OF MISDEMEANOR.

*Acknowledgment of satisfaction by prosecutor, under Code of Criminal
 Procedure, § 664.*

STATE OF NEW YORK, } ss.:
 COUNTY OF

I,, of the town of....., county
 of... , State of New York, do hereby acknowledge to have
 received of of the same place, the sum of
dollars in full satisfaction for the injury.

.....

No. 251½.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the keeper of the common jail of said county :

Whereas,, upon whose oath John Doe was arrested for assault and battery against the said, and was duly committed to your charge on the day of, and who now remains under your care;

And Whereas, The said has duly executed an acknowledgment of satisfaction for said assault before me;

Now, this is to command you forthwith to discharge the said John Doe from your custody in said jail, unless detained upon some other warrant of commitment.

Dated at, this day of, 188..

A. B.,

Justice.....

No. 252.

Order discharging recognizance on settlement of case. 1

COUNTY OF, ss.:

The within-named complainant, having this day appeared before me,, a justice of the peace of the county of, and acknowledged in writing that he had received full satisfaction of the within-named John Doe, for the injury complained of, I do hereby order the within recognizance to be discharged.

Dated at, this day of, 188..

A. B.,

Justice.....

No. 253.

Summons to corporation, under Code Criminal Procedure, § 676.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

You are hereby summoned to appear before me at the court room, in the on the day of, 188.., at.... o'clock in the..... noon, to answer a charge made against you upon the information of, for

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 254.

Affidavit of serving summons on corporation, under Code of Criminal Procedure, § 677.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that on the day of , 188., at, in the county of, State of New York, he served the within summons upon, president [or other officer] of said [giving corporate name], by delivering a true copy thereof to and leaving the same personally with the said

Subscribed and sworn before me, }
this day of, 188. }

.....
Justice of the Peace (or Police Justice).

No. 255.

Indorsement on deposition, under Code of Criminal Procedure, §§ 678, 679.

COUNTY OF, ss.:

I hereby certify that there is sufficient cause to believe the above-named defendant guilty of the offense charged.

Dated at the day of, 188..

A. B.,
Justice of the Peace (or Police Justice).

No. 256.

Order directing jury to be summoned, under Code of Criminal Procedure, § 708.

(Name of court.)

THE PEOPLE
against

To any marshal of the city of, and to any constable of the county of.....

We command you, that you summon twelve good and lawful men qualified to serve as jurors, and not exempt from such service by law, and who shall be in no wise of kin either to the complainant or the defendant, to be and appear before the court, to be held at the court-room, in the in and for the, on the day of , 188., to make a jury for the trial of the complaint, charge and offense against the above-named ... , wherein he is charged with, then and there to be tried before the said court. Whereof fail not.

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 257.*List of persons summoned as jurors, under Code of Criminal Procedure, § 704.***LIST OF PERSONS SUMMONED AS JURORS PURSUANT TO
ANNEXED ORDER.**

.....

I hereby certify that, in obedience to the within order, I have personally
 summoned the above-named persons as jurors.

Dated at, this day of, 188..

.....
 Constable (or Marshal).

No. 258.*Oath of jurors — Special Sessions — under Code of Criminal Procedure, § 711.*

You do swear [or do solemnly affirm] that you will well and truly try this
 issue between the people of the State of New York, and A. B., the defendant,
 and a true verdict give, according to the evidence

No. 259.*Judgment of court of Special Sessions, under Code of Criminal Procedure,
§§ 717, 718.*

(Name of court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

} Judgment..... 188

The defendant was this day convicted, on a trial by the court or a jury,
 on a plea of guilty, and the court sentenced h.. to imprisonment in the
 of this county..... days, and pay a fine of.....
 dollars, and be imprisoned until paid, not exceeding.....days.

.....
 Police Justice (or Justice of the Peace).

No. 260.*Certificate of conviction, under Code of Criminal Procedure, § 721.***COURT OF SPECIAL SESSIONS — COUNTY [OR TOWN] OF.....**

THE PEOPLE
against
 A. B.

} January 18

The above named A. B. having been brought before C. D., E. F. and G. H.,
 justices of the peace of the city [or town of], charged with [describe the
 offense briefly], and having requested to be tried by a court of special sessions

[or having been required by us to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for the space of twenty-four hours after being so required].

And the above named A. B. having thereupon pleaded not guilty [or guilty], and demanded [or failed to demand] a jury, and having been thereupon duly tried, and upon such trial duly convicted.

We have adjudged that he be imprisoned in the jail of this county..... days, or pay a fine of dollars, and be imprisoned until it is paid, not exceeding.....days [or both, as the case may be].

Dated at, this day of

(Signed)

C. D.,

E. F.,

G. H.,

Justices of the Peace.

No. 261.

Record of conviction on plea of guilty— Trial by Court Special Sessions— under Code of Criminal Procedure, §§ 721, 722.

THE PEOPLE OF THE STATE OF NEW YORK
against

}188..

The above named.....having been brought before me,....., one of the police justices [or justices of the peace] of the....., charged with..... and having requested to be tried by a court of special sessions; and the above named.....having been thereupon duly convicted upon a plea of guilty;.....I have adjudged that he be imprisoned in the.....of the county of.....days, and pay a fine of.....dollars, and be imprisoned until it be paid, not exceeding.....days.

Dated at, the.....day of.....188..

Police Justice (or Justice of the Peace).

No. 262.

Record of conviction— Special Sessions (plea of guilty)— no request for trial by court, or bond given to county sessions— under Code of Criminal Procedure, §§ 721, 722.

(Name of Court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

}

The above named.....having been brought before me,....., one of the police justices [or justices of the peace] of the....., charged with.....

and not having requested to be tried by a court of special sessions, and having been required by me to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for twenty-four hours after being so required, and the above named having been thereupon convicted upon a plea of guilty..... I have adjudged that he be imprisoned in the.....of the county of...days, and pay a fine of..... and be imprisoned until it be paid, not exceeding.....days.

Dated at....., the.....day of.....188..

.....
Police Justice (or Justice of the Peace).

No. 263.

Record of conviction—Special Sessions (plea of guilty)—No request for trial by court, or bond given to county sessions—under Code of Criminal Procedure, §§ 721, 722.)

(Name of court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

The above named.....having been brought before me,....., one of the police justices [or justices of the peace] of the.....charged with..... and not having requested to be tried by a court of special sessions, and having been required by me to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for twenty-four hours after being so required, and the above named having been thereupon convicted upon a plea of guilty,.....I have adjudged that he be imprisoned in the.....of the county of.....days, and pay a fine of.....and be imprisoned until it be paid, not exceeding.....days.

Dated at....., the.....day of.....188..

.....
Police Justice (or Justice of the Peace).

No. 264.

Certificate to add to copy to be delivered to officer as mittimus, under Code of Criminal Procedure, § 725.

STATE OF NEW YORK, } ss.:
COUNTY OF

I certify that I have compared the foregoing with the original certificate made and signed by me as a court of special sessions, and that the same is a correct copy thereof and transcript therefrom, and of the whole thereof.

Witness my hand this day of, 188..

.....
Justice of the Peace of the of in said county.

No. 265.

Commitment to special sessions, under Code of Criminal Procedure, § 734.

(Name of court.)

THE PEOPLE against	}
-----------------------	---

The sheriff of the county of is required to receive and detain
....., who stands charged before me for
to answer the charge before a court of special sessions, to be held in the
.....

Dated at, the day of, 188..

.....

Police Justice (or Justice of the Peace).

No. 266.

Undertaking to Special Sessions to be held by Justice, under Code of Criminal Procedure, §§ 786, 787, 788.

STATE OF NEW YORK, } ss.:
COUNTY OF....., }

.....having been duly charged before.....,
one of the police justices [or justices of the peace] of the.....
with the offense of..... We undertake
that ..he shall appear thereon, from time to time, until judgment at a court
of special sessions, in the....., held by the justice above named, or
that we will pay to the county of.....the sum of two hundred dollars.

Dated at, this.....day of....., 188..

.....
.....

Taken, subscribed and acknowledged before }
me, this.....day....., 188., }

.....

Police Justice (or Justice of the Peace) of the City of Albany.

(Justification of sureties as in No. 233.)

No. 267.

Undertaking to Court of Special Sessions to be held by the Recorder, under Code of Criminal Procedure, § 788; Laws 1881, ch. 364, § 2.

STATE OF NEW YORK, } ss.:
COUNTY OF....., }

....., having been duly charged before.....,
one of the police justices [or justices of the peace] of the city of.....,
with the offense of..... We undertake that he

shall appear thereon, from time to time, until judgment at a court of special sessions in the city of, to be held by the recorder of the said city, at the City Hall in said city, with or without one or more of the justices of the peace of the said city to be associated with him, or that we will pay to the county of.....the sum of.....hundred dollars.

Dated atthis.....day of.....188..

Taken, subscribed and acknowledged before }
me, the day and year above mentioned. }

.....
.....
Police Justice (or Justice of the Peace).

No. 268.

Attachment against a witness for disobedience of subpoena in a Court of Special Sessions.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To any sheriff, marshal, constable or policeman of the county of.....

You are hereby commanded to attach....., and bring him before the undersigned, a justice of the peace of said county, at his office in the town of....., county of....., and State of New York, forthwith to testify the truth, according to his knowledge, in an action now pending before the said justice of the peace between the People of the State of New York and John Doe, defendant, on the part of....., and also to answer all such matters as may be brought against him, the said....., for not obeying a subpoena of this court duly served herein.

Dated at....., this.....day of....., 188..

A. B.,
Justice of the Peace.

No. 269.

Attachment against a witness for disobeying subpoena returnable before a police justice in cities.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To any sheriff, marshal, constable or policeman of the county of.....

You are hereby commanded to attach....., and bring him before....., the police justice of the city of....., in said county, at the police court-room, forthwith to testify the truth, according to his knowledge, in an action now pending

between the People of the State of New York and John Doe, the defendant, on the part of....., and also to answer all matters that may be brought against him, the said, for not obeying the subpoena of this court, and duly served herein upon him.

Dated at....., this.....day of....., 188..

.....
Police Justice.

No. 270.

Venire for jury in court of Special Sessions.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, marshal, constable or policeman of the county of.....

You are hereby commanded to summon twelve good and lawful men qualified to serve as jurors and not exempt from such service by law, and who are in nowise kin to either the complainant.....or..... the defendant herein to be and appear before the undersigned, a justice of the peace [or police justice] of said.....acting as a court of special sessions at his office in theon the....day of..... to make a jury for the trial of saidon a charge ofand have you then and there this precept together with a list of the jurors by you summoned.

Dated at.....this.....day of.....188..

A. B.,

Justice of the Peace (or Police Justice).

No. 271.

Subpoena by coroner.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

The People of the State of New York to A. B., C. D. and E. F.:

We command you, and each of you, that all excuses and business being laid aside, to appear in your proper persons before the undersigned, one of the coroners of said county of, at in said county, on the day of at o'clock A. M. on that day, to give evidence concerning the death of Hereof fail not at your peril.

Dated at, this day of

A. B.,

Coroner.

No. 272.

Oath of witness.

You solemnly swear that the evidence which you shall give upon this inquest touching the death of shall be the truth, the whole truth, and nothing but the truth. So help you God.

No. 273.

Oath to interpreter.

You solemnly swear that you will truly interpret to the witness the oath that shall be administered to him upon this inquest, and shall also truly interpret between the coroner, the jury and the witness. So help you God.

No. 274.

Oath to be administered to the foreman of a coroner's jury, under Code Criminal Procedure, § 774.

You do solemnly swear that you will well and truly inquire how and in what manner, and when and where, the person lying here came to his death, and who such person was, and into all the circumstances attending his death, and by whom the same was produced, and that you will make a true inquisition thereof, according to the evidence offered to you or arising from the inspection of the body. So help you God.

No. 275.

Oath to other jurors.

The same oath which A. B., the foreman of this inquest, hath on his part taken, you and each of you do now take, and shall well and truly keep on your parts. So help you God.

No. 276.

Attachment against a witness, under Code of Criminal Procedure, § 776.

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, marshal or constable of the county of.....

You are hereby commanded to attach....., and bring him before the undersigned, one of the coroners of said county of....., at the dwelling-house of....., in said county of....., forthwith to testify upon a certain inquest, then and there

to be had upon the body of, and also to answer for not having answered the subpoena herein, hereto duly served upon him,

Dated at....., this.....day of....., 188..

A. B.,
Coroner.

No. 277.

Return to attachment of coroner.

COUNTY OF....., ss.:

I,, hereby certify that I have arrested the within, and have him in my custody now here, as I am within commanded.

Dated at....., this.....day of....., 188..

A. B.,
Sheriff.

No. 278.

General form of inquisition.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

An inquisition taken at.....in the.....on the.....day of....., before me....., one of the coroners of said county aforesaid, on the view of the body of, then and there lying dead, upon the oaths and affirmations of A. B., C. D., etc. [giving names of all the jurors], good and lawful men of the State of New York, duly chosen, who being then and there duly sworn and charged to inquire, on behalf of the people of the said State, where, when, how and after what manner the said came to his death, do, upon their oaths and affirmations, say that the said [here state the findings of the jury with particularity].

Dated at....., this.....day of...., 188..

(Signed by all the jurors.)

A. B., Coroner.

No. 279.

Examination of witnesses to be attached to the inquisition, under Code of Criminal Procedure, § 778.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

Examination of witnesses produced, sworn and examined on this..... day of....., at....., before....., coroner, and A. B., C. D., etc., jurors, good and lawful men of said county, duly summoned and sworn by the said coroner to inquire how and in what manner and when and where.....came to his death, and who such person was, and into all the circumstances attending such death, and to

make true inquisition, according to the evidence or arising from the investigation of the body.

John Doe, being produced and sworn, says that: [Insert his testimony.]

JOHN DOE.

Subscribed and sworn before me, }
this.....day of.....188... }

A. B., *Coroner.*

Add also evidence of other witness in a similar manner.

I do hereby certify that the testimony of the several witnesses appearing upon the foregoing inquest was reduced to writing by me, and the same subscribed by said witnesses in my presence, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

Dated at this day of 188..

A. B.

Coroner.

No. 280.

Coroner's warrant for the arrest of the person charged by the inquisition with murder, under Code of Criminal Procedure, §§ 780, 781.

STATE OF NEW YORK, } ss.:
COUNTY OF.. .. }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman in this State:

An inquisition having been this day found by a coroner's jury before me, stating that A. B. has come to his death by the act of C. D., by criminal means [or as found by the inquisition].

You are therefore commanded forthwith to arrest the above named C. D., and take him before the nearest and most accessible magistrate in this county.

Dated at this day of 188..

E. F.,

Coroner, etc.

No. 281.

Recognizance by witness on coroner's inquest.

RENSSELAER COUNTY, ss.:

Be it remembered that on the day of 188..., A. B., C. D. and E. F., all of the city of Troy, in said county, personally came before me,, a coroner of said county, and severally acknowledged themselves to be indebted to the people of the State of New York, each separately, in the sum of dollars, to be made and levied of their goods and chattels, lands and tenements, to the use of said people if default shall be made in the following condition:

The condition of this obligation is such that if the above bounden A. B., C. D. and E. F. shall personally be and appear at the next term of the court of, to be held in and for the county of

on the day of, to give evidence on behalf of said people against for as well to the grand jury as to the petit jury, do not depart the said court without leave, then the recognizance to be void and of no effect, otherwise to remain in full force.

(Signed)

Subscribed and acknowledged before }
me, this.....day of..... }

G. H., *Coroner.*

No. 282.

Warrant of commitment by coroner.

STATE OF NEW YORK, } ss.:
COUNTY OF, }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff or any constable of the county of, and to the keeper of the common jail of said county:

Whereas, having been charged upon inquisition taken before me, one of the coroners of said county, with having on the day of, at, feloniously, and of malice aforethought, killed and murdered and the said having been brought before me as such coroner, and after having examined witnesses, and having duly considered the whole matter, and it now appearing to me that the said crime has been committed, and that there is probable cause to believe the said guilty thereof as is stated and set forth in the aforesaid inquisition.

You are, therefore, hereby commanded to forthwith convey and deliver to the said keeper of the said jail the body of the said and you, the said keeper, are hereby required to receive the said into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Dated at.....this.....day of.....188..

G. H.,
Coroner

No. 283.

District attorney's application to the governor for a requisition for a fugitive from justice, founded upon an exemplified copy of the indictment against the prisoner, under Code of Criminal Procedure, § 827.

To his Excellency, Governor of the State of New York:

Application is hereby made for a requisition against John Doe. That the party complained of, to wit, said John Doe, is a fugitive from justice, and that I believe him to be at this time in the State of That he fled from this State before arrest could be made, and that the ends of justice require that he should be brought back to this State for trial. This

application is based upon an indictment, an exemplified copy of which is hereto annexed. It is affirmatively stated that no other application for a requisition for the same person, for an offense arising out of the same transaction, has been previously made.

I hereby name the State of.....as the State upon which the requisition is asked, and name.....one of the constables of said county of.....as a proper person to whom the warrant is to issue and certify that said.....has no private interest in the arrest of the said fugitive.

Dated at.....this.....day of.....188..

A. B.,
District Attorney, etc.

(Annex exemplified copy of the indictment.)

No. 284.

Affidavit to accompany application for requisition.

STATE OF NEW YORK, } ss.:
COUNTY OF

.....of the.....
in said county, being duly sworn, says that he is a detective in said city; that he knows said John Doe, named in the preceding application and exemplified copy of the indictment; that the said John Doe is a fugitive from justice, and that according to the best knowledge and belief of deponent the said alleged fugitive is at the time of making this application in the village of.....county of.....in the State of.....and that the grounds of such belief are as follows, to wit: [set forth the grounds of deponent's belief.]

J. D.,
Detective.

Subscribed and sworn before me, }
this....day of..... }

.....
.....

No. 285.

Application for a requisition from the governor for the arrest of a fugitive from justice, based upon affidavits.

To his Excellency.....Governor of the State of New York:

Application for a requisition is hereby made against John Doe.

That the party complained of, to wit, said John Doe, is a fugitive from justice, and that I believe him at this time to be in the State of.....; that he fled from this State before arrest could be made, and that the ends of justice require that he should be brought back to this State for trial.

That this application is based upon affidavits, and that hereto annexed is the certificate of the magistrate taking them; that in his opinion the party

making them is to be believed, and that they make a proper case for a requisition.

I further certify that in my opinion if the facts stated in the affidavits are true, they would result in a conviction. That no previous application for a requisition, arising out of this transaction, has been previously made.

I hereby name.....a constable of the city of..... as a proper person to whom the warrant may issue, and I hereby certify that said.....has no private interest in the arrest of said fugitive; and I hereby name the State of.....as the State upon which the requisition is asked.

Dated at.....this.....day of.....188..

A. B.,
District Attorney, etc.

[The affidavit referred to in the preceding application should state all facts and circumstances tending to show that the alleged fugitive has committed the crime charged, and should be such as would justify the issuing of a warrant if within this State.]

No. 286.

Certificate of magistrate to be attached to foregoing application.

I.....of.....the magistrate before whom the foregoing affidavits were taken, do hereby certify that the parties making them are, in my opinion, to be believed, and that said affidavits present a proper case for a requisition.

Dated at.....this.....day of.....188..

J. D.,
Justice of the Peace (or Police Justice).

No. 287.

County clerk's certificate of official character of magistrate.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

I.....clerk of said county, do hereby certify that J. D., before whom the annexed affidavits were made, and whose names are thereto subscribed, and who has also signed the foregoing certificate, was, at the day of the date thereof, a justice of the peace in and for said county duly commissioned and sworn, and that his signature thereto subscribed is genuine.

In testimony whereof, I have this.....day of.....
[L. s.] subscribed my name and affixed the official seal of said county.

J. K.,
Clerk.

No. 288.

Application to inquire regarding charge of bastardy, under Code of Criminal Procedure, § 840.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

To....., a justice of the peace [or police justice] in and for the county of.....

Whereas..... is pregnant with child likely to be born a bastard, and to become chargeable to the said county of..... [or to a certain town in said county], the undersigned, one of the superintendents of the poor of said county [or an overseer of the poor or officer of the almshouse], hereby makes an application to you pursuant to the statute in such cases made and provided to make inquiry into the facts and circumstances of the case.

Dated at..... this..... day of..... 188..

A. B.,
Superintendent, etc.

No. 289.

Examination of a mother of a bastard before birth, under Code of Criminal Procedure, § 841.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

The examination of..... of the town of..... in said county of..... taken on oath before me,..... a justice of the peace of said county at..... on the..... day of..... the said..... on her oath before me, said that she is now pregnant of a child, likely to be born a bastard and to become chargeable to the county of [or town of]....., and that..... of..... in said town of..... in said county, is the father of said child.

(Signed)

Subscribed and sworn before me, }
this..... day of..... }

A. B.,
Justice of the Peace (or Police Justice).

No. 290.

Examination after birth of child, under Code of Criminal Procedure, § 841.

(Formal part as in No. 289.)

And the said..... on her oath before me taken as above stated, says that on the .. day of..... at the..... of..... in said county, she was delivered of a male child, which is chargeable to said town of [or county of]

and that, of the town of, in said county, is the father of the said child.

(Signed)

Subscribed and sworn before me, }
this day of

A. B.,

Justice of the Peace (or Police Justice).

No. 291.

Warrant for the arrest of putative father, under Code of Criminal Procedure, § 841.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff, or any constable, marshal or policeman of said county, town or city:

Whereas, Upon the application of, a superintendent [or overseer] of the poor of said county [or town], duly made to me,, a justice of the peace of said county, I have ascertained by the examination of, of the town of in said county; that she, the said is now pregnant of a child [or was delivered of a child on the day of, etc.], which child is likely to become a charge against said county of [or town of], and that of the town of in said county, is the father of said child.

Now, you are hereby commanded forthwith to arrest the said and bring him before me at my office, in the town of in said county of, for the purpose of having an adjudication respecting the filiation of said child likely to be born [or born] a bastard.

Dated at this day of

A. B.,

Justice of the Peace (or Police Justice).

No. 292.

Indorsement to be made upon the warrant when the putative father is in another county, of the sum in which bond is to be taken, under Code of Criminal Procedure, § 844.

I,, the justice of the peace who issued the within warrant, hereby direct that any bond which shall be taken of within named shall be in the sum of dollars.

Dated at this day of

A. B.,

Justice of the Peace (or Police Justice).

No. 293.

Indorsement to be made where warrant is to be executed in another county, under Code of Criminal Procedure, § 843.

STATE OF NEW YORK, } ss.:
COUNTY OF

Due and proper proof upon oath having been made before me
a justice of the peace of the county of, that the name of
..... purporting to be subscribed to the within war-
rant, is in the handwriting of said, the within
mentioned justice of the peace, and I do hereby authorize the arrest of the
within named in the said county of

Dated at this day of

A. B.,
Justice.

No. 294.

Undertaking to be taken by justice who indorsed the warrant, or by some other justice of the same county, under Code of Criminal Procedure, § 844.

STATE OF NEW YORK, } ss.:
COUNTY OF

Know all men by these presents, that we, A. B. and B. C. and C. D., sure-
ties, all of the town of county of and State
of New York, are held and firmly bound to the people of the State of New
York, in the sum of for the payment whereof to the said
people we bind ourselves, our executors, administrators, jointly and severally
by these presents.

Sealed with our seals and dated the day of

Whereas, The above bounden A. B. has been arrested in the said county
of, has been arrested upon a warrant issued by,
one of the justices of the county of, and indorsed by one of
the justices of the peace of said county of, in which war-
rant the said A. B. is charged with being the reputed father of a bastard child
of which was lately delivered [or is about to be
delivered] at in said county of
Now, therefore, the condition of this obligation is such that if the said
shall indemnify the said county of [or town of]
and every other county, town or city, which may have incurred any expense
or which may be put to any expense for the support of such child or its
mother during her confinement and recovery therefrom against all such
expenses, and shall pay the costs of apprehending the said A. B. and of any
order of filiation that may be made, then this obligation to be void; other-
wise to be and remain in full force and virtue.

(Signed) A. B. [L. s.]
B. C. [L. s.]
C. D. [L. s.]

(Justification of sureties as in No. 288.)

No. 295.

Similar bond for appearance at Sessions, under Code Criminal Procedure, § 844, subdivision 2.

(Formal part as in No. 292.)

Now, therefore, the condition of this obligation is such that if the saidshall appear at the next court of sessions to be held in and for the county of.....on the.....day of....., and not depart the said county without its leave, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed as in No. 292.)

(Justification of sureties as in No. 283.)

No. 296.

Certificate to be indorsed upon warrant on discharge, under Code Criminal Procedure, § 845.

COUNTY OF....., ss.:

I,, a justice of the peace of the county of, before whom the within named A. B. was brought, he having been arrested in said county of....., after it had been indorsed by me [or by another justice of said county of.....], do hereby certify that the said A. B. has executed a bond, with two sureties, in the sum indorsed upon the warrant, and required according to the statute in such case made and provided, and which is herewith delivered to, the officer who brought the within warrant; and that I have thereupon discharged the said A. B. from arrest upon the within warrant.

Dated at....., this.....day of....., 188..

B. C.,
Justice of the Peace.

No. 297.

Subpoena in bastardy case.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To A. B., B. C., etc.:

You are hereby commanded that, laying all other matters aside, you and each of you personally appear before.....and....., justices of the peace of the county of....., at the office of, in the....., on the.....day of..... at ten o'clock A. M. on that day, to testify the truth and give evidence, according to your knowledge, touching the father of a bastard child of whichhas been lately [or is about to be] delivered.

Dated at....., this.....day of....., 188..

(Signed.)

Justice of the Peace.

No. 298.

Order of filiation in bastardy case, under Code Criminal Procedure, § 850.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

Whereas, We and , two of the justices of the peace of the county of , have this day, in pursuance of the statute in such case made and provided, upon the application of , one of the superintendents of the poor of the said county of , have convened at the town of in said county , for the purpose of making an examination and determination touching a certain child, of which , of the town of , in said county, is pregnant [or has lately been delivered], and which is likely to become a bastard, and of which is the reputed father;

And Whereas, We have duly examined the said , upon oath, concerning and touching the father of said child, and have also heard all other proofs and allegations in reference thereto, whereby it appears that said child is likely to be born a bastard and become chargeable to the county of , and that the said is the father of the said child.

We therefore, after due examination, hereby adjudge the said to be the father of the said bastard child.

And we, the justices aforesaid, do therefore order that the said do pay to the superintendent of the poor of the county of [or to the overseer of the poor of the town of] for the support of said child, weekly and every week, the sum of dollars, so long as the said child shall continue chargeable as aforesaid.

And Whereas, It also appears that , the mother of said child is in indigent circumstances, we do further order and determine that the said pay to the said superintendent [or overseer] for the maintenance and support of said , during her confinement the sum of dollars. And we, the said justices aforesaid, do further certify the reasonable costs of apprehending and securing the said father and of this order of filiation at the sum of dollars.

Dated at , this day of , 188..

G. H.,

F. G.,

Justice of the Peace (or Police Justice).

No. 299.

Bond on adjournment in bastardy case, under Code of Criminal Procedure, § 849.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

Know all men by these presents, that we, A. B., B. C., C. D., all of the town of , in the county of , are held and firmly bound unto the people of the State of New York in the sum of dollars,

for the payment of which to said people we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed, etc., and dated this day of, 188..

Whereas, The above named has this day been brought before and, two justices of the peace in and for the county of, charged upon the oath of with being the putative father of a bastard child, lately born to her at, and the said justices having convened according to law to examine into the facts and circumstances of the case and adjudicate respecting the filiation of said bastard child, and the maintenance thereof;

And Whereas, At the request of the said, for sufficient reasons given, the said justices have determined to adjourn the said examination and adjudication upon the execution of this bond until the day of at the office of in the town of in said county.

So, therefore, the condition of this obligation is such that if the said shall personally appear before the said justices at the time and place aforesaid, and not depart therefrom without the leave of said justices, then this obligation to be void, otherwise to remain in full force and effect.

(Signed)

A. B. [L. s.]

B. C. [L. s.]

E. F. [L. s.]

Sealed and delivered in presence of

H. B.,

J. D.,

Justices.

(Justification of sureties as in No. 233.)

No. 300.

Warrant of commitment of putative father, under Code of Criminal Procedure, §§ 852, 853.

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff or any constable, marshal or policeman of the county of, and to the keeper of the common jail of said county :

Whereas, By an order of filiation, duly made and executed by and before and, two of the justices of the county of, whereby A. B. was adjudged to be the reputed father of a certain bastard child, lately born to in the town of county of

And Whereas, By said order of filiation the said A. B. was adjudged to pay to the superintendent of the poor of said county the weekly sum of, as long as said child should continue chargeable to said county, and also that

the said A. B. should pay to said superintendent the sum of dollars for the maintenance and support of, during her confinement and recovery;

And Whereas, Due notice has been given to said A. B. of said requirements, who has wholly neglected the same, or to enter into a bond to secure the same;

Now you are hereby commanded to arrest and deliver to the keeper of the common jail of the county of forthwith the body of said A. B., and you, the said keeper are hereby commanded to receive and safely keep the said A. B. until he shall pay said costs and sums adjudged against him, give the required bond, or be otherwise discharged by due process of law.

Dated at, this day of, 188..

(Signed)

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 301.

Warrant for discharge of putative father after commitment.

COUNTY OF, ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the keeper of the common jail of the county of

Whereas, A. B. was, on the day of, duly committed to your custody on a warrant issued under our hands, for disobeying an order of filiation, whereby he was adjudged to be the putative father of a bastard child, of which was then supposed to be pregnant;

And Whereas, It now appears that said was not in fact pregnant at all [or married before delivery];

Now you are hereby commanded to forthwith discharge from your custody the said A. B., unless he be there lawfully detained on some other warrant.

Dated at, this day of, 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 302.

Bond by father under order of filiation.

STATE OF NEW YORK, } ss. :
COUNTY OF, }

(Formal part as in No. 299.)

Whereas, and two of the justices of the county of have this day made and signed an order of filiation, whereby A. B. is adjudged to be the father of the bastard child of in the town of county of

And Whereas, By said order of filiation it was adjudged that said A. B.

pay to the superintendents of the poor of said county the sum of..... dollars per week while said child remained a charge to said county;

And Whereas, The said A. B. was likewise adjudged to pay to said superintendents the sum of.....dollars for the maintenance and support of the said.....during confinement and recovery and also to pay a certain amount for costs in these proceedings;

Now, therefore, the conditions of this obligation are such that if the said A. B. shall well and truly observe all of the conditions of said order of filiation, then this obligation shall be void, otherwise to be and remain in full force and effect.

Dated at.....this.....day of.....188....

A. B. [L. s.]

C. D. [L. s.]

E. F. [L. s.]

(Justification of sureties as in No. 233.)

No. 303.

Summons to mother of bastard child to show cause why she should not be made to support it, under Code of Criminal Procedure, § 857.

COUNTY OF, ss.:

To any constable [or other peace officer] of the county of.....

You are hereby commanded to summon.....of the town of.....in the county of.....to appear before.....and.....two of the justices of the peace of said county, at the office of.....in the town of.....on the.....day of....., at ten o'clock A. M. of that day, to show cause why she should not be ordered to support a certain bastard child, of which she was lately delivered at.....and for the keeping of which the county of.....is or is likely to become chargeable, the superintendent of the poor of said county having duly applied to us for that purpose.

Dated at....., this.....day of....., 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices.)

No. 304.

Order to compel mother to support bastard child, under Code of Criminal Procedure, § 857.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

Whereas, It satisfactorily appears to the undersigned, two of the justices of the peace of the county of....., that.....who was lately delivered of a bastard child at....., in said county, which

said child has become a charge upon said county; that said.....
is possessed of property in her own right and is of sufficient ability to support said child.

And Whereas, The said.....in obedience to a summons duly appeared before us and failed to show cause why she should not be compelled to support said child. Now we, the said justices do hereby order thatpay to the superintendents of the poor of the said county of....., weekly and every week, the sum of..... dollars, for the support of said child so long as it remains a charge to said county.

Dated at....., this.....day of....., 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 305.

Warrant to commit mother of bastard, under Code of Criminal Procedure, § 858.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable [or other peace officer] of the county of, and to the keeper of the common jail of said county :

Whereas, By an order heretofore duly made by us the mother of a bastard child now a charge upon the county of [or town of], was ordered and directed to pay to the superintendent of the poor of said county the weekly sum of dollars ;

And Whereas, The said utterly neglects and refuses to comply with such order, or to nurse, take care of and support said child herself ;

Now you, the said constable, etc., are hereby commanded to forthwith arrest the said, and deliver her into the custody of the keeper of the common jail of the county of ; and you, the said keeper, are hereby commanded to receive into your custody the said, and safely keep her, without bail, until she shall comply with said order, unless she shall execute a bond to the people of the State of New York in the sum of dollars, with two good and sufficient sureties, to appear at the next court of sessions of said county of, and not to depart the said court without leave.

Dated at this day of

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 306.

Bond to be given by mother of bastard to appear at Court of Sessions.

(Formal part as in No. 299.)

COUNTY OF ss. :

Whereas, By an order heretofore, on the day of, duly made by us, the mother of a bastard child now a charge upon the town of, in said county of [or against said county of], was adjudged to pay the superintendents [or overseers] of the poor of said county of [or town] the weekly sum of dollars for the support of said child, unless she should herself support the same, so that it should not be or become a public charge.

Now the condition of this obligation is such that if the said shall personally appear at the next court of sessions to be held in and for the county of, at the court-house in the county of on the day of, and shall not depart therefrom without leave, then this obligation shall be void, otherwise to remain in full force and effect.

Dated at this day of

A. B.
C. D.
E. F.

Signed, sealed and delivered }
the day of }

H. B.,
J. D.,
Justices.

No. 307.

Warrant for commitment of mother for refusing to disclose name of father, under Code of Criminal Procedure, § 856.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable [or other police officer] of the county of....., and to the keeper of the common jail of said county:

Whereas, Complaint has been made before me that one of the town of, in said county of, was delivered of a bastard child on the.....day of....., 1882, which would likely become a charge upon said county.

And Whereas, Said when brought before me refused, and still refuses, to disclose the name of the father of said bastard child, although now sufficiently recovered from her confinement.

Now you, the said constable, etc., are hereby commanded forthwith to convey and deliver the said.....into the custody of

said keeper; and you, the said keeper, are hereby required to receive the saidinto your custody in said jail, and her safely keep until she shall testify and disclose the name of the father of said child.

Dated at....., this.....day of....., 188..

H. B.,
Justice of the Peace.

No. 303.

Order reducing the amount directed to be paid by the father of a bastard, under Code of Criminal Procedure, § 859.

COUNTY OF....., ss.:

Whereas, By an order of filiation, dated the.....day of..... and made by us,and....., two justices of the peace of the county of....., it was ordered that A. B., of the town of....., in said county, should pay to the superintendent of the poor of said county the weekly sum of dollars in support of a certain bastard child of which he was adjudged to be the father;

And Whereas, After further examination into the facts and circumstances surrounding the case, circumstances surrounding the said child seem to us to render it expedient and proper that the sum required to be paid by the said, by our former order, should be reduced; and we do hereby reduce the weekly payment to the sum of dollars.

Dated at, this day of, 188..

H. B.,
J. D.,
Justices of the Peace.

No. 309.

Warrant for the seizure of the property of an absconding father, under Code of Criminal Procedure, § 860.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the superintendent of the poor of the county of [or to the overseers of the town of]:

Whereas, It appears to us by evidence on oath that A. B., lately adjudged by us in an order of filiation to be the father of a certain bastard child, lately born to one, at, in the county of

And Whereas, The said A. B. was adjudged in said order to pay to the superintendent of said county the weekly sum of, for the support of said child;

And Whereas, It further appears by proof on oath that said has absconded from the said county of, leaving the said bastard child a public charge on said county;

And Whereas, The said superintendent has applied to us for our warrant to serve the estate of the said;

Now you, the said superintendent of the poor of said county, are hereby authorized and commanded to take and seize the goods, chattels, effects and things in action, of every name and nature, belonging to the said A. B., wherever the same may be found in the said county of....., and you are directed immediately upon such seizure to make an inventory of the property by you taken, and return the same, together with your proceedings under this warrant, to the next court of sessions of the said county of

Dated at, this day of, 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 310.

Notice by superintendent or overseer of the poor that application will be made to the Court of Sessions to increase the amount made payable by the order of filiation.

To A. B.:

SIR. — Please to take notice that I shall make application at the next court of sessions to be held in and for the county of.....at the court-house in the county of.....on the.....day of.....at the opening of court on that day, or as soon thereafter as I may be heard, for an order of said court increasing the sum directed to be paid by the order of filiation, of which the annexed is a copy, for the support of the bastard child therein named; also take further notice that hereto annexed are copies of the affidavits and papers upon which said application will be founded.

Dated at.....this.....day of.....18....

Yours, etc.,

L. R.,

Superintendent, etc.

No. 311.

Notice to be given the superintendents or overseers of a motion to reduce amount named in order of filiation, under Code of Criminal Procedure, § 859.

To L. R., superintendent [or overseer] of the poor:

SIR. — Please to take notice that I shall make application to the next court of sessions to be held in and for the county of..... at the court-house in the county of.....on the.....day of.....at 10 o'clock A. M. of that day, or as soon thereafter as I may be heard, for an order of said court reducing the sum directed to be paid by the order of filiation, of which the annexed is a copy, for the support of the bastard child therein named; also take notice that hereto are annexed the affidavit and papers upon which this application will be founded.

Dated at.....this.....day of.....188....

A. B.

No. 312.

Notice of appeal from an order of filiation, under Code of Criminal Procedure, § 851.

To H. B. and J. D., two justices of the peace of the county of.....and to
L. R., superintendent of the poor, and to.....mother of said child :

You will please to take notice that the undersigned, considering himself aggrieved by the order of filiation, of which a copy is hereto annexed, hereby appeals to..... from said order, and every part thereof, to the next court of sessions, to be held in and for the county of..... on the..... day of.....

Dated at.....this of..... 188.

Yours, etc.,
A. B.

No. 313.

Subpoena on appeal in bastardy case.

..... COUNTY, ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To A. B., B. C., etc. :

The court of sessions, in and for the county of..... held at the court-house in said county, commands you and each of you to personally appear before said court on the..... day of..... at ten o'clock A. M. on that day, to testify the truth according to your knowledge, in a certain appeal then and there to be heard, from an order of filiation in a bastardy case, heretofore made by..... and..... two of the justices of said county, and whereof you fail not under the penalty of fifty dollars.

Witness.....county judge, this..... day of.....

J. K., Clerk.

No. 314.

District attorneys precept for Oyer and Terminer.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

[SEAL] To the sheriff of the county of.....

Whereas, A court of oyer and terminer and jail delivery is to be held in and for the county of..... at the court-house in the..... on the..... day of.....

We command you, in pursuance of the provisions of the Revised Statutes in such case made and provided,

First. That you summon the several persons who have been drawn in said county of pursuant to law to serve as grand jurors and petit jurors at said court to appear thereat.

Second. That you bring before the said court all prisoners then being in the jail of said county, together with all processes and proceedings in any way concerning them in your hands as such sheriff.

Third. That you make proclamation in the manner prescribed by law,

notifying all persons bound to appear at said court by recognizance or otherwise, to appear thereat, and requiring all justices of the peace, coroners and other officers who have taken any recognizance for the appearance of any person at such court, or who shall have taken any inquisition or examination of any prisoner or witness, to return such recognizance or inquisition and examination to the said court at the opening thereof on the first day of its term.

Witness Hon, justice of the supreme court, this.....
day of

J. K., Clerk.

A. B., District Attorney.

No. 315.

Proclamation on foregoing precept.

Whereas, A court of oyer and terminer is appointed to be held in and for the county of, on the day of, proclamation is therefore hereby made in conformity to a precept to me directed and delivered by the district attorney of county on the day of, to all persons bound to appear at the said court of oyer and terminer by recognizance or otherwise, to appear thereat, and all justices of the peace, coroners and other officers who have taken any recognizances for the appearance of any person at such court, or who have taken any inquisition or the examination of any prisoner or witness, are required to return such recognizance, inquisition or examination at the opening of the first day of said court.

Dated at, this day of, 188..

J. I.,

Sheriff of the county of

No. 316.

Return to district attorney's precept.

STATE OF NEW YORK, }
COUNTY OF } ss.:

I have executed the within precept as I am within commanded, by having duly summoned the jurors drawn for the court mentioned therein to appear thereat, by making immediate proclamation as therein commanded, and causing the same to be published in a public newspaper printed in said county once a week from the receipt of said precept until the time appointed for said court, and by having the prisoners in jail brought before the said court, with all processes and proceedings in any way concerning them in my hands.

Dated at, this day of, 188..

J. I.,

Sheriff of the county of

No. 317.

Calendar of prisoners in jail.

To the Court of....., now in session :

I, the undersigned,.....sheriff of the county of....., do hereby certify that the following is a correct list of the prisoners now detained in the jail of said county; the time when each was committed, by what process and the crime charged:

(1) John Doe, committed January 10, 188..., by justices' warrant, charged with burglary in first degree.

[Giving the same regarding all.]

A. B.,

Sheriff of the county of.....

No. 318.

Attachment for disobeying subpoena as for contempt, under Code of Criminal Procedure, § 619.

(Name of court and title of case.)

STATE OF NEW YORK, {
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff of the county of....., or any constable, marshal or policeman of said county:

This is to command you and each of you to forthwith attach the body ofand bring him before the court of..... now in session at the court-house in the....., then and there to answer for certain contempt in refusing or neglecting to attend the said court and give evidence before said court, according to the terms of a subpoena heretofore issued out of this court, and duly served on him on theday of....., as a witness on behalf of the people of this State [or of the defendant], and have you then and there this writ; and you are further commanded to detain him until he be discharged by the said court.

Dated at....., this.....day of....., 188..

By order of the Court.

J. K., Clerk.

To be indorsed:—

Allowed this.....day of....., 1882.

A. B.,

Jus. Sup. Court (or Judge of..... County.)

No. 319.

Order of court where prisoner is acquitted on ground of insanity, under Code of Criminal Procedure, § 454.

COURT OF OYER AND TERMINER.

IN THE MATTER OF JOHN DOE, WHO HAS ESCAPED
CONVICTION ON GROUND OF INSANITY.

Whereas, The jury have acquitted the said John Doe of the crime of....., whereof he was charged in the trial now just concluded, on the ground of insanity, duly certified by said jury, which certificate is now on file in the county clerk's office; and this court having thereupon carefully inquired and ascertained whether his insanity still continues, and being fully satisfied his insanity does still continue, it is hereby ordered, in pursuance of the statute in such case made and provided, that the said John Doe be kept in safe custody, and for that purpose be sent to the State Lunatic Asylum at, and the sheriff of the county is hereby empowered and commanded to carry this order into effect, and to take the said to said asylum, to be there kept until discharged by due course of law.

Dated at, this day of, 188..

A. B.,
Justice Supreme Court.

No. 320.

Order of court appointing commission to inquire as to the insanity of prisoner before trial, under Code of Criminal Procedure, § 658.

IN THE MATTER OF
.....
A SUPPOSED LUNATIC.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

It having been made to appear to me that, a person indicted by the last grand jury of the county of, of the crime of, is a person of unsound mind and wholly irresponsible, I do therefore, in pursuance of the statute in such case made and provided, hereby appoint, M. D.,, counselor-at-law, and, Esq., all of the county of, a commission forthwith to examine into the mental condition of the said, and make their report thereon to this court, with all convenient speed, and due notice of the time and place of executing this commission be given to the district attorney of this county.

A. B.,
Justice Supreme Court.

No. 321.

Notice to district attorney of executing commission, under Code of Criminal Procedure, § 658.

To Hon. District Attorney of county :

SIR. — Please to take notice that pursuant to an order of the supreme court of the State of New York, heretofore duly made and filed, the undersigned as commissioners to inquire into the mental condition of John Doe, now confined in jail charged with the crime of , will proceed to execute their said commission, at the said jail on the day of , 188.., at eleven o'clock A. M. of that day.

Dated at , this day of , 188..

Yours, etc.,

(Signed)
.....
.....

Commissioners.

No. 322.

Inquisition of commissioners on insanity of prisoner, under Code of Criminal Procedure, § 658.

IN THE MATTER OF JOHN DOE, AN ALLEGED
LUNATIC. }

STATE OF NEW YORK, } ss.:
COUNTY OF

To the Court of

An inquisition taken the day of , 188.., before commissioners duly appointed to inquire into the mental condition of John Doe, now confined in county jail, upon their oaths do hereby report as follows: [Here insert full report of conclusions of commission, with their reasons for such belief.]

(Signed) A. B.,
C. D.,
E. F.,

Commissioners.

No. 323.

Oath of commissioners in foregoing inquest, under Code of Criminal Procedure, § 658.

You do, each for yourself, swear that you will well and truly inquire whether the prisoner John Doe be of sane or insane mind, and that you will true report make thereof according to the evidence. So help you God.

No. 324.

Engagement of parent, master or guardian of vagrant child, under Code of Criminal Procedure, § 888.

POLICE COURT (OR OTHER COURT).

THE PEOPLE
against

Whereas, The above named, residing in the county of and State of New York, a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of 188.. found wandering in the streets and lanes of the city of a truant, without any lawful occupation.

And Whereas, Complaint was duly made to, one of the police justices [or justice of the peace] of the city of, against said child therefor.

And Whereas, Said justice did cause a peace officer to bring such child before him for examination on said complaint, and did cause the parent, guardian or master of said child to be summoned to attend such examination;

And Whereas, On such examination the said complaint was satisfactorily established, and the said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, to the city of, that . he will restrain said child from so wandering about as aforesaid, will keep h... in h.... own premises or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year, until ..he becomes fourteen years old.

Now, this agreement and engagement witnesseth : That the said..... the parent, guardian or master of said child, hereby covenants, promises and agrees, to and with the said city of, that he will restrain said child from so wandering about as aforesaid, and will keep h... in his own premises and in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year, until ..he becomes fourteen years old.

In witness whereof, I have hereunto set my hand and seal this day of, 188..

..... [L. S.]

Sealed and delivered in presence of

.....

Police Justice (or Justice of the Peace).

No. 325.

Undertaking of parent, master or guardian of vagrant child, under Code of Criminal Procedure, § 888.

..... COURT, } ss.:
CITY AND COUNTY OF.....

Whereas, Complaint having been duly made before....., one of the police justices [or justices of the peace] of the city of..... in the county of..... and State of New York, that..... residing in....., in the..... of....., in the county of..... and State of New York, a child of the age of..... years, having sufficient bodily health and mental capacity to attend the public schools, was, on the..... day of....., 188., found wandering in the streets of the said city of....., a truant, without any lawful occupation.

And Whereas, The said justice, on such complaint being made, did duly cause a peace officer to bring such child before him for examination, and did duly cause....., the parent, guardian or master of such child, to be summoned to attend such examination.

And Whereas, such examination was, on the..... day of....., 188., duly had before said justice, and said complaint satisfactorily established.

And Whereas, On the establishment of said complaint, said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, with..... suret..... in the sum of..... hundred dollars, to the city of..... that ..he will restrain such child from so wandering about as aforesaid; will keep h.... in h.... own premises, or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year until ..he becomes fourteen years old.

Now, therefore, we,....., the said parent, guardian or master, residing in....., county of....., by occupation a....., and....., residing in....., county of....., by occupation a....., and....., residing in....., county of....., by occupation a....., sureties, hereby undertake that the said..... will restrain said child from wandering about the streets of said city of....., a truant, without lawful occupation; will keep h.... in h.... own premises or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year until ..he becomes fourteen years old; or, if he fail to perform either of those conditions, we, the said sureties, will pay to the city of..... the said sum of..... hundred dollars.

Dated at....., the..... day of....., 188..

(Justification of sureties as in No. 283.)

No. 326.

Summons to parent, etc., to attend examination of vagrant child, under Code of Criminal Procedure, § 888.

..... COURT, } ss.:
CITY AND COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To..... parent, guardian or master of.....

Whereas, Complaint and information on oath has been duly made by
..... of the city of in the county of.....
before me,....., one of the justices of the peace [or police justice]
of the city of....., that on the..... day of..... 188...
said..... who is a child between the age of five and fourteen
years, having sufficient bodily health and mental capacity to attend the public
schools, was found wandering in the streets of the city of.....
aforesaid, a truant without any lawful occupation and said.....
has been duly arrested and is now in custody on said charge, and is to be
examined thereon before the said at the police court-room
in the city of....., on the..... day of..... 188..
You are hereby summoned and required to attend said examination at the
time and place aforesaid.

Witness the said..... at the city of..... and county aforesaid,
the..... day of..... 188....

.....
Justice of the Peace (or Police Justice).

No. 327.

Certificate of conviction of vagrant, under Code of Criminal Procedure, § 891.

..... COURT, } ss.:
CITY AND COUNTY OF.....

I certify that....., having been brought before me, charged
with being a vagrant, I have duly examined the charge, and that upon h..
own confession in my presence, or upon the testimony of, by
which it appears that ..h.. is a person....., I have adjudged
that ..h.. is a vagrant.

Dated at....., this day of....., 188..

.....
Police Justice (or Justice of the Peace).

No. 328.

Certificate of conviction, under Code of Criminal Procedure, § 902.

..... COURT, } ss.:
CITY AND COUNTY OF.....

I certify that....., having been brought before me, charged
with being a disorderly person, I have duly examined the charge, and that

upon h.. own confession in my presence, or upon the testimony of,
by which it appears that ..h.. is a, I have adjudged that
..h.. is a disorderly person.

Dated at, this day of, 188

.....
Police Justice (or Justice of the Peace).

No. 329.

Application for order to compel the support of poor relative, under Code Criminal Procedure, § 915.

To the Court of Sessions of the county of

We, the overseers of the poor of the town of, in the
county of, and State of New York, respectfully show
to the court that one John Doe is an indigent person and without the means
of necessary support, and is a charge upon the town of, where
the said John Doe resides; that William Doe is a son of said John Doe, and
is also a resident of the same place, who, although perfectly able, refuses to
support the said John Doe, or to contribute thereto. Your petitioners, there-
fore, pray that an order may issue out of this court, directed to the said
William Doe, compelling him, the said William Doe, to provide for the sup-
port and maintenance of the said John Doe forthwith.

Dated at, this day of, 188..

A. B.,

B. C.,

Overseers of the Poor of the town of

No. 330.

Notice to person liable to support relative, under Code Criminal Procedure, § 915.

TO WILLIAM DOE, Esq.:

SIR.—Please to take notice that the undersigned, overseers of the poor of
the town of, will apply to the court of sessions of the county
of, at the opening of court on the day of,
at the court-house in the county of, for an order compelling
you to support and maintain one John Doe, and for such other relief as may
be just.

Dated at, this day of, 188..

A. B.,

B. C.,

Overseers of the Poor, etc.

No. 331.

Order compelling relative to support poor person, under Code Criminal Procedure, § 916.

COURT OF SESSIONS—COUNTY OF

IN THE MATTER OF THE APPLICATION OF THE OVERSEERS OF THE POOR IN BEHALF OF JOHN DOE, A POOR PERSON.

At a term of the court of sessions of the county of....., held at the court-house in and for the county of....., on the..... day of....., 188..

Present—Hon., Judge of.....county.

On reading and filing the application of A. B. and B. C., overseers of the poor of.....county, and on due proof of the service of notice of said application upon William Doe, and after hearing the proofs and allegations of the respective parties, it is hereby ordered that the said William Doe pay to the said overseers, the weekly sum of.....dollars each and every week, for the support and maintenance of the said John Doe, so long as he shall remain and be a charge upon the said town of..... as aforesaid; and that he also pay to said overseers the sum of.....dollars, as and for their costs and expenses in procuring this order.

J F.,
County Judge.

No. 332.

Complaint against apprentice or servant, under Code of Criminal Procedure, § 927.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in the city of.....in said county; that one.....is an apprentice lawfully bound to serve him as prescribed by the special statutes in such cases made and provided; that the said..... will fully absents himself from duty without the consent of his master, and refuses to serve this deponent according to his duty.

Subscribed and sworn before me, }
this.....day of.....188.. }

.....
Justice of the Peace (or other officer named in § 927).

No. 333.

Warrent for arrest of apprentice under Code Criminal Procedure, § 928.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable [or other peace officer] of the county [or city] of.....

Whereas, Complaint has been this day made to me.....a justice of the peace of the town [or city] of.....in said county by.....against one.....a person regularly apprenticed to the said.....according to law, showing that the said.....has willfully absented himself from duty and refuses longer to serve the said.....

Now this is to command you that you arrest the said.....and forthwith have him before me at my office in the.....of.....on the.....day.....

Dated at.....this.....day of.....188..

A. B.,
Justice of the Peace.

No. 334.

District attorney's statement of convictions, under Code of Criminal Procedure, § 941.

The following is a statement of the convictions for criminal offenses, and of which said following-named persons were found guilty [or plead guilty] at the court of sessions, held in and for the county of, at the court-house in the city of, on the day of

John Doe, having been duly tried by a jury for the crime of arson in the first degree, was found guilty by said jury on the day of, 188.., and was sentenced by the court to hard labor for the term of years at Clinton prison, N. Y.

[Following with each conviction.]

A. B.,
District Attorney for County.

No. 335.

Clerk's statement of convictions to Secretary of State, under Code of Criminal Procedure, § 943.

Statement of the entries in the minutes of the court of sessions, held at the court-house in the county of, on the day of, before J. F., judge of county, with A. B. and B. C., associates, of all indictments therein tried, specifying the convictions and acquittals on the same, also of convictions by confession, and discharges:

The whole number of indictments tried by said court was, of which were for murder, in which defendant was

three were for grand larceny, in two of which the defendants were....., and in one he was; five for robbery, all of whom were

[Add such others as are included in the list.]

No person was discharged by said court without trial.

One person was convicted of larceny and one of bigamy, on their own confession.

I,, clerk of the county of and clerk of the court of oyer and terminer, held in and for the county of, on the day of, do hereby certify that the foregoing is a true and correct statement of the number of indictments tried at the said court, and of the results of said trials.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this day of

J. K.,
Clerk of County.

No. 336.

Clerk's return of certificates of convictions made by Court of Special Sessions, under Code of Criminal Procedure, § 944.

A return of copies of all convictions made by courts of special sessions in the county of filed with the clerk of said county since the fifth day of last month.

[The certificates must be copied *verbatim*. To which the following certificate may be added:]

I,, clerk of the county of, do hereby certify that the preceding are true and correct copies of all certificates of convictions made by any court of special sessions, and filed in my office within the period above specified.

Signed and sealed this day of

A. B.,
County Clerk.

No. 337.

Sheriff's report of criminal statistics, under Code of Criminal Procedure, §§ 945, 946.

To the Secretary of State at

The following is a correct report of the number of persons convicted in the city courts, courts of special sessions and police court during the month next preceding the first day of 188., together with the crime, charge, sex, age, nativity, married or single, degree of education, religious instruction, etc., etc., as prescribed in section No. 945 of the Code of Criminal Procedure.

[The following may serve as a form for each:]

Question. What is your name and occupation? *Answer*.....

Question. What is your age? *Answer*

Question. Where were you born? *Answer*.....

Question. Are you married or single? *Answer*.....

Question. What religious instruction have you received and in what religious denomination have you received it? *Answer*.....

Question. What education have you received? *Answer*.....

Question. Are your parents living or dead? *Answer*.....

Question. Are you temperate or intemperate? *Answer*.....

Question. Have you been before convicted, or not, of any crime; if you have, of what crime and where convicted? *Answer*.....

Dated at....., this.....day of....., 188..

A. B.,
Sheriff of.....county.

ANNOTATED
PENAL CODE

OF THE

STATE OF NEW YORK,

AS AMENDED IN 1882.

*With Notes of all Judicial Decisions referring to the
same, together with an Exhaustive Index.*

EDITED BY
GEORGE R. DONNAN.

ALBANY, N. Y.:
JOHN D. PARSONS, JR., LAW PUBLISHER.
1882.

Entered, according to act of Congress, in the year eighteen hundred and eighty-two

By JOHN D. PARSONS, JR.,

In the office of the Librarian of Congress, at Washington.

S U M M A R Y

O F

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THE
PENAL CODE
OF THE
STATE OF NEW YORK.

CHAPTER 676.

AN ACT TO ESTABLISH A PENAL CODE.

PASSED July 26, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

PRELIMINARY PROVISIONS.

SECTION 1. Title of Code.

2. Its effect.
3. Definition of "crime."
4. Division of crimes.
5. Definition of felony.
6. Definition of misdemeanor.
7. Definition of misdemeanor.
8. Objects of the Penal Code.
9. Convictions must precede punishment.
10. Jury to find degree of crime.
11. General rules of construction of this act.
12. Of sections declaring crimes punishable.
13. Punishments, how determined.
14. Punishment of felonies when not fixed by statute.
15. Punishment of misdemeanors when not fixed by statute.

SECTION 1. **Title of Code.** — This act shall be known as the
PENAL CODE OF THE STATE OF NEW YORK.

New.

§ 2. **Its effect.** — No act or omission begun after the beginning of the day on which this Code takes effect as a law, shall be deemed criminal or punishable, except as prescribed or authorized

by this Code, or by some statute of this state not repealed by it. Any act or omission begun prior to that day may be inquired of, prosecuted and punished in the same manner as if this Code had not been passed.

U. S. Const., art. I, § 10, subd. 1.

(a) **Retrospective act.**—An act of the legislature is not to be construed to operate *retrospectively*, so as to take away a vested right: (*Dash v. Van Kleck*, 7 Johns., 477.)

(b) **Law must be prospective.**—It is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect. (*Id.*; *Van Valkenburg v. Torrey*, 7 Cow., 252; *Sayre v. Wiener*, 8 Wend., 601; *Van Rensselaer v. Wiener*, 12 id., 490.)

(c) **Rules of evidence excepted.**—The rules of evidence, however, or the details of a criminal trial, may be changed as to prior as well as subsequent offenses. (*Stokes v. People*, 58 N. Y., 164.)

An act in relation to capital punishment is retrospective, and applies to all persons thereafter convicted, though the crime was committed before the enactment of the law. (*Hartung v. The People*, 26 N. Y., 167.)

(d) **Ex post facto.**—An act is *ex post facto* which attempts to change the punishment for arson committed before the passage of an act. (*Shepherd v. People*, 25 N. Y., 406; 24 How., 388.)

§ 3. **Definition of "crime."**—A crime is an act or omission forbidden by law, and punishable upon conviction by

1. Death; or
2. Imprisonment; or
3. Fine; or
4. Removal from office; or
5. Disqualification to hold any office of trust, honor or profit under the state; or
6. Other penal discipline.

3 R. S., 995, § 54; see, also, 2 R. S., 726, § 32 (2 Edm., 702); 1 Bish. Cr. Law, § 43.

(a) **Criminal proceedings defined.**—Proceedings against beggars and vagrants, to prevent the commission of crime, against disorderly persons, and those in reference to search warrants, are criminal proceedings. (*People v. Supervisors of Ontario*, 4 Den., 260.)

(b) **Id.**—All acts injurious to private persons, and which tend to produce violent resentment, are criminal. (*People v. Smith*, 5 Cow., 258.)

(c) **Malice.**—When malice is unnecessary to constitute a guilty act. (*People v. Reed*, 47 Barb., 235.)

§ 4. **Division of crimes.**—A crime is either

1. A felony; or
2. A misdemeanor.

See 4 Black. Com., 94 and 95; 2 R. S. (Edm.), 726, and *Id.*, 690, § 30.

§ 5. **Definition of felony.**—A felony is a crime which is or may be punishable by either

1. Death; or
2. Imprisonment in a state prison.

2 R. S., 995, § 51; 2 R. S. (Edm.), 726, § 30.

(a) **Felony defined.**—Where power to imprison in a state prison is discretionary, the offense is a felony. (*People v. Van Steenburgh*, 1 Park., 39; *People v. Borges*, 6 Abb. Pr., 132.)

(b) **Fraudulent assignment.**—An assignment of a bond and mortgage fraudulently may also amount to a felony. (*Peabody v. Fenton*, 3 Barb. Ch., 451.)

(c) **Assault and battery.**—An assault and battery is not a felony, unless committed with a deadly weapon. (*O'Leary v. People*, 4 Park., 187; 17 How., 316.)

(d) **Obtaining goods by false pretenses.**—Obtaining goods by false pretenses is a felony under the Revised Statutes. (*Andrew v. Dieterich*, 14 Wend., 81; see, also, *Mowery v. Walsh*, 8 Cow., 238; *Robinson v. Dauchy*, 3 Barb., 20.)

(e) *Seem*, that the Revised Statutes have not made the offense of petit larceny a misdemeanor, but that it is still a felony as at common law. (*Ward v. People*, 3 Hill, 395; 6 id., 144; *Mowery v. Walsh*, 8 Cow., 238; see, also, *Carpenter v. Nixon*, 5 Hill, 260.)

(f) **Definition of the term felony.**—The definition of the term felony in the Revised Statutes, when used in a statute, has not so changed the common law as to prevent a purchaser in good faith, and for value, obtaining title to goods which the original vendee obtained by false pretenses. (*Fussett v. Smith*, 23 N. Y., 252.)

(g) **Petit larceny.**—Petit larceny, as a first offense, is not a felony which disqualifies the convict as a witness. (*Shay v. People*, 22 N. Y., 317.)

§ 6. **Definition of misdemeanor.**—Any other crime is a misdemeanor.

New in form. (2 R. S. [Edm.], 719, § 39; also, see § 38.)

(a) **Petit larceny.**—*Seem*, that the Revised Statutes have not made the offense of petit larceny a misdemeanor, but that it remains a felony as at common law. (*Ward v. People*, 3 Hill, 395; 6 id., 144; see, also, 5 id., 260.)

(b) **Misdemeanor.**—A police justice illegally discharging a prisoner on bail is guilty of a misdemeanor under section 39 of Revised Statutes. (*People v. Bogart*, 3 Park. Cr. R., 143.)

(c) **Any prohibited act.**—The doing of any prohibited act, a punishment for which is not otherwise provided, is a misdemeanor. (*People v. Bogart*, 3 Abb., 193.)

(d) **Malicious mischief.**—Malicious mischief is a misdemeanor, and all acts which tend to excite violent resentments, and thus produce a disturbance of the peace. (*People v. Smith*, 5 Cow., 258; *Loomis v. Edgerton*, 19 Wend., 419; see, also, *post*, § 505.)

(e) **Prohibited marriages.**—If a husband or wife divorced on account of his or her adultery marry again during the life of the innocent party, it is a misdemeanor. (*People v. Hovey*, 5 Barb., 117.)

§ 7. **Definition of misdemeanor.**—This Code specifies the classes of persons who are deemed capable of crimes, and liable to punishment therefor; defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each.

New.

§ 8. **Objects of the Penal Code.**—The manner of prosecuting and convicting criminals is regulated by the Code of Criminal Procedure.

Code Crim. Proc., § 4; Laws 1881, ch. 442.

§ 9. **Conviction must precede punishment.**—The punishments prescribed by this Code can be inflicted only upon a legal conviction in a court having jurisdiction.

N. Y. Const., art. 1, § 1; Code Crim. Proc., § 3.

(a) **Competent court.**—The guilt of a person accused of a crime is to be determined in a competent court by a jury, and the people as well as the accused have the right to have it so determined. (*Davis v. American Society*, etc., 75 N. Y., 362; *Woods v. City of Brooklyn*, 14 Barb., 425, distinguished.)

(b) **New offense.**—Where a statute creates a new offense, making that unlawful which was lawful before, and prescribes a particular penalty therefor, that penalty alone can be enforced; the offense is not indictable. (*People v. Hislop*, 77 N. Y., 331; see, also, *Behan v. People*, 17 id., 516.)

(c) **Due process of law.**—“No person shall be deprived of liberty without due process of law,” construed with reference to inmates of inebriate asylums. (*In re Adrian Janes*, 30 How., 446.)

(d) **Id.**—Due process of law defined. (*Id.*, 454; *Taylor v. Porter*, 4 Hill, 140; *Dew v. Hoboken Land and Improvement Co.*, 18 How. U. S. Reps., 272; *Wynehamer v. People*, 13 N. Y., 393.)

§ 10. **Jury to find degree of crime.**—Whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime of which he is guilty.

3 R. S., 995, § 48; 2 R. S. (Edm.), 702, § 27; Code Crim. Pro., § 444.

(a) **Degree inferior to that charged.**—The statute allowing a conviction of an offense in any degree inferior to that charged in the indictment, applies only where the higher grade includes the lesser with additional circumstances. (*Dedieu v. People*, 22 N. Y., 178; distinguished in *Levy v. People*, 80 id., 327, 333.)

§ 11. **General rules of construction of this act.** — The rule that a penal statute is to be strictly construed does not apply to this Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.

New.

§ 12. **Of sections declaring crimes punishable.** — The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.

New in form. (See 1 Bish. Crim. Law, § 934.)

§ 13. **Punishments, how determined.** — Whenever, in this Code, the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code.

New in form. (See 1 Bish. Crim. Law, § 934.)

§ 14. **Punishment of felonies when not fixed by statute.** A person convicted of a crime declared to be a felony, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment for not more than seven years, or by a fine of not more than one thousand dollars, or by both.

New.

§ 15. **Punishment of misdemeanors when not fixed by statute.** — A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.

3 R. S., 995, § 103; 2 R. S. (Edm.), 719, § 40; see § 706, *post*.

(a) **Selling spirituous liquors illegally.** — Selling spirituous liquors illegally is a misdemeanor within the statute fixing punishment for misdemeanors not otherwise provided for. (*Foot v. People*, 56 N. Y., 321.)

TITLE I.

PERSONS PUNISHABLE FOR CRIME.

SECTION 16. What persons are punishable criminally.

17. Presumption of responsibility in general.
18. Presumption of responsibility as to child under seven years.
19. Presumption of responsibility as to child of seven years or more.
- 20, 21. Irresponsibility, etc., of idiot, lunatic, etc.
22. Intoxicated persons.
23. Morbid criminal propensity.
24. Rule as to married woman.
25. Rule as to persons acting under threats, etc.
26. Rule as to persons acting under threats, when act done in defense of self or another.
27. Exemption of public ministers.

§ 16. What persons are punishable criminally. — The following persons are liable to punishment within the state :

1. A person who commits within the state any crime, in whole or in part ;
2. A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterwards found, with any of the property stolen or feloniously appropriated within this state ;
3. A person who, being without the state, causes, procures, aids or abets another to commit a crime within the state ;
4. A person who, being out of this state, abducts or kidnaps by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state, and is afterwards found therein ;
5. A person who, being out of this state and with intent to cause within it a result contrary to the laws of this state, does an act which, in its natural and usual course, results in an act or effect contrary to its laws.

New.

(a) **Advice of counsel.** — The advice of counsel will not relieve a person from the penalty of an indictable offense. (*Hamilton v. People*, 57 Barb., 625.) Ignorance of the law does not excuse it; malice is not an ingredient in the commission of an act prohibited by statute. (*People v. Reed*, 47 Barb., 235; *Smith v. Brown*, 1 Wend., 231.)

Criminal intent necessary to constitute a breach of penal statute. (*Sturges v. Mailland*, Anth. [N. P.], 208 ; see, also, *Baker v. Richardson*, 1 Cow., 77 ; *Morris v. People*, 3 Den., 381.)

That defendant was illegally apprehended in a foreign country is no defense to jurisdiction. (*People v. Rowe*, 1 Sheld., 81; *People v. McLeod*, 25 Wend., 83; 1 Hill, 377; *People v. Wright*, 2 Cai., 213; *People v. Gardner*, 2 Johns., 477; *People v. Schenck*, Id., 479.)

A crime committed in one state is not cognizable in another. (*People v. Wright*, 2 Cai., 213.)

If one steal a horse in another state, and be taken in this state in possession of the stolen property, he cannot be tried here. (*People v. Gardiner*, 2 Johns., 277; *People v. Schenck*, Id., 479; *McCullough's case*, 2 C. H. Rec., 45.)

An offense committed on board a vessel must be tried in some county through which it passed. (*People v. Hulce*, 3 Hill, 309.)

A murder committed on board a vessel in Long Island Sound is indictable in this state, etc. (*People v. Wilson*, 3 Park., 199.)

§ 17. Presumption of responsibility in general.—A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this Code.

New.

(a) **Ignorance of the law.**—Ignorance of the law will not excuse the commission of a crime. (*Hamilton v. People*, 57 Barb., 625; *Smith v. Brown*, 1 Wend., 231.)

(b) **Advice of counsel.**—The advice of counsel will not relieve a person from the penalty of an indictable offense. (*Hamilton v. People*, 57 Barb., 625.)

(c) **Under direction of another.**—Nor that the act charged was done as the clerk of another, and by his direction. (*French v. People*, 3 Park., 114.)

(d) **A person presumed responsible.**—A person is presumed responsible for the natural consequences of his acts. (*People v. Adams*, 16 Hun, 549.)

(e) **Sanity presumed.**—Sanity is the presumed normal condition of the human mind. (*Walters v. People*, 32 N. Y., 147; *O'Brien v. People*, 48 Barb., 277.)

And insanity as a defense must be affirmatively established. (*People v. Robinson*, 1 Park., 649; 2 id., 235; *Sellick's case*, 1 C. H. Rec., 185; *Brother-ton v. People*, 18 Alb. L. J., 395; *People v. O'Connell*, 25 id., 42.)

(f) **Weakness of intellect.**—Weakness of intellect not amounting to insanity, does not excuse the commission of a crime. (*Patterson v. People*, 46 Barb., 625.)

(g) **Moral responsibility.**—Where a prisoner knows that an act is unlawful and morally wrong, he is responsible. (*Willis v. People*, 32 N. Y., 715; 5 Park., 621; *Flanagan v. People*, 52 N. Y., 467; *Wagner v. People*, 2 Keyes, 687; 4 Abb. Dec., 509; *People v. Waltz*, 50 How. Pr., 204; *People v. Moett*, 23 Hun, 60; *People of U. S. v. Guiteau*, —.)

(h) **Phrensy.**—Phrensy, induced by violent passion, will not excuse the commission of a crime. (*Pierronis' case*, 3 C. H. Rec., 123; *Sanchez v. People*, 4 Park., 585; 18 How., 72; 22 N. Y., 147.)

(i) **Feigned insanity.**—What is sufficient evidence that insanity is feigned. (*Waltz's case*, 3 Abb. N. C., 309.)

(j) **Previous insanity.**—Where previous insanity is established, the burden of proving that the crime was committed during a lucid interval is upon the prosecution. (13 Abb. Pr. [N. S.], 207.)

(k) **Presumption of sanity.**—The legal presumption is that every man is sane, and if a person gives no evidence in contradiction, the fact stands, but if he gives some evidence tending to overthrow that presumption, the prosecution must satisfy the jury beyond a reasonable doubt as to his sanity. (*People v. O'Connell*, 25 Alb. L. J., 42.)

§ 18. Presumption of responsibility in general, as to child under seven years.—A child under the age of seven years is not capable of committing crime.

New.

An infant under seven years not responsible for crime. (*Walker's case*, 5 C. H. Rec., 187; *People v. Davis*, 1 Wheeler's Cr. Cas., 230; *Stage's case*, 5 C. H. Rec., 177; 1 Colby's Cr. Law, § 1; 4 Bl. Com., 22, 23.)

(a) **Maintaining a nuisance.**—An infant of tender age not responsible for maintaining a nuisance. (*People v. Townsend*, 3 Hill, 479.)

§ 19. Presumption of responsibility in general, as to child of seven years or more.—A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness.

New.

Between the age of seven and fourteen years, the capacity of an infant to commit crime must be shown. (*Walker's case*, 5 C. H. Rec., 187; *Stage's case*, Id., 177.)

(a) **Presumption in favor of infant.**—Where, on a charge of felony against an infant under fourteen years of age, no proof of capacity is given, the presumption is in his favor, and the jury must acquit. (*People v. Davis*, 1 Wh. Cr. Cases, 230.)

NOTE.—It will be seen that this section reduces the maximum from fourteen to twelve years.

§ 20. Irresponsibility, etc., of idiots, lunatics, etc.—An act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime. A person cannot be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense. (Amended 1882.)

2 R. S., 988, § 2; 2 R. S. (Edm.), 720, § 2; 4 Black. Com., 24.

(a) **Dissipation.**—Insanity occasioned by previous habits of intemperance, and not resulting directly from the immediate use of intoxicating liquors,

renders the party irresponsible for the commission of a crime. (*O'Brien v. People*, 48 Barb., 274.)

(b) **Intoxication and premeditation.**—Not error to refuse to charge the jury that they may infer from the presence of intoxication the absence of premeditation. (*Id.*)

(c) **Finding on preliminary issue.**—A finding upon a preliminary issue that the prisoner was then sane so as to be capable of making a defense, has no bearing upon the question of his responsibility for the crime for which he was on trial. (*Freeman v. People*, 4 Den., 9.)

(d) **Reasonable doubt.**—If the jury have a reasonable doubt regarding a person's sanity, they must acquit. (*People v. McCann*, 16 N. Y., 58; *Wagner v. People*, 2 Keyes, 684; 4 Abb. Dec., 509; *Cole's case*, 7 Abb. Pr. [N. S.], 321; see, also, *People v. Schruyver*, 42 N. Y., 1; *Brotherton v. People*, 75 id., 159; *Walters v. People*, 82 id., 147; *O'Brien v. People*, 48 Barb., 274; *People v. Robinson*, 1 Park., 649; *State v. Crawford*, 11 Kan., 32; *People v. O'Connell*, 25 Alb. L. J., 42.)

(e) **Weakness of intellect.**—Weakness of intellect, not amounting to insanity, is no defense. (*Patterson v. People*, 46 Barb., 625)

(f) **Responsibility of lunatic.**—A lunatic is responsible for a crime committed during a lucid interval. (*Clark's case*, 1 C. H. Rec., 176.)

(g) **Insanity resulting from fever.**—Insanity resulting from intermittent fever, etc. (*People v. Beno Ville*, 8 Abb. N. C., 195.)

(h) **Epilepsy.**—Facts necessary to excuse an epileptic. (*Stauderman's case*, 8 Abb. N. C., 187; *Jenisch's case*, id., 200.)

(i) **Phrensy.**—A phrensy, which is the result of a violent passion, will not excuse the commission of a crime. (*Pierrovis' case*, 3 C. H. Rec., 123; *Sanchez v. People*, 4 Park., 535; 18 How., 72; 22 N. Y., 147.)

(j) **Previous insanity.**—Where previous insanity is proved, the prosecution must show that the crime was committed during a lucid interval. (*People v. Montgomery*, 18 Abb. Pr. [N. S.], 207.)

(k) **Proof of insanity.**—What facts may be given in evidence to show insanity on part of the prisoner. (*Lake v. People*, 1 Park., 495.)

(l) **Power of choosing between right and wrong.**—The law does not recognize a form of insanity, in which the capacity of knowing right and wrong exists without the power of choosing between them. (*Flanagan v. People*, 52 N. Y., 467.)

(m) **Partial insanity.**—Partial insanity, with reference to a prisoner's responsibility. (*State v. Huling*, 21 Mo., 464; *Bovard v. State*, 30 Miss., 600.)

(n) **Moral insanity.**—Moral insanity not recognized as an excuse for crime. (*Charci v. State*, 31 Ga., 424; *Guileau's case*, —.)

See, however, *People v. Kleim*, Edm. (S. C.), 13; *People v. Devine*, id., 594; *People v. Pine*, 2 Barb., 566; *Krom v. Schoonmaker*, 3 id., 467.

(o) **Uncontrollable influence.**—It is no defense that in consequence of an uncontrollable influence a prisoner had no power over his will. (*Walt's case*, 50 How. Pr., 204.)

(p) **Id.**—If a person retains the use of his reason, there is no such thing as uncontrollable impulse to commit crime. *Id.*

§ 21. **Irresponsibility, etc., of idiots, lunatics, etc.** — A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either,

1. Not to know the nature and quality of the act he was doing; or

2. Not to know that the act was wrong. (Amended 1882.)

2 R. S. (Edm.), 720, § 2.

(a) **Knowing an act to be unlawful.** — Where a prisoner, at the time of committing a crime, is in such a state of mind as to know that an act is unlawful and morally wrong, he is responsible. (*Willis v. People*, 32 N. Y., 715; 5 Park., 621; *Flanagan v. People*, 52 N. Y., 487; *Wagner v. People*, 2 Keyes, 684; 4 Abb. Dec., 509; *People v. Waltz*, 50 How. Pr., 204; 3 Abb. N. C., 209; *People v. Kleins*, Edm. S. C., 18; *People v. Montgomery*, 1. Abb. Pr. [N. S.], 207; *People v. Moett*, 23 Hun, 60; *People v. Sprague*, 2 Park., 43.)

(b) **Knowledge and reason.** — A person must not only know that an act is unlawful and morally wrong, but he must have reason sufficient to apply such knowledge and be controlled by it. (*McFarland's trial*, 8 Abb. Pr. [N. S.], 57.)

(c) **Spiritual influence.** — Influence of spirits is no defense where a knowledge of right and wrong exists. (*People v. Waltz*, 50 How., 204.)

(d) **Feigned insanity.** — What is sufficient evidence that insanity is feigned. (*Waltz's case*, 3 Abb. N. C., 109.)

(e) **Phrensy.** — Phrensy, without a total derangement, will not excuse a crime. (*Pierrotis' case*, 3 C. H. Rec., 123; see, also, *Sanchez v. People*, 22 N. Y., 147; 4 Park., 535.)

(f) **Insane impulse.** — If the act complained of was done under an insane impulse, which at the time destroyed the capacity to distinguish between right and wrong, the party is not responsible. (*People v. Sprague*, 2 Park., 43.)

§ 22. **Intoxicated persons.** — No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

New.

(a) **Voluntary intoxication.** — Voluntary intoxication furnishes no excuse for crime. (*Kenny v. People*, 81 N. Y., 330; 27 How., 202; 18 Abb., 91; *Longorgan v. People*, 6 Park., 209; 50 Barb., 266; *Freery v. People*, 54 id., 319; *Peo-*

ple v. Porter, 2 Park., 214; *People v. Fuller*, Id., 16; *People v. Wiley*, Id., 19; *Com. v. Hawkins*, 3 Gray, 463.)

Voluntary intoxication, though amounting to phrensy, is no defense where a homicide is committed without provocation. (*People v. Rogers*, 18 N. Y., 9; reversing 3 Park., 632; *Kenny v. People*, 31 N. Y., 380; *People v. Robinson*, 1 Park., 649; 2 id., 235; *People v. Hammill*, Id., 223; *People v. Batting*, 49 How., 392; *People v. Eastwood*, 3 Park., 25; 14 N. Y., 562; *State v. Harlow*, 21 Mo., 446; *Shanahan v. Com.*, 8 Bush, 463; *Rafferty v. People*, 66 Ill., 118; *Charei v. State*, 31 Ga., 424; *Humphreys v. State*, 45 id., 190.)

(b) **Evidence of intoxication.**—Evidence of intoxication is always admissible to explain the conduct and intent of the prisoner. (*People v. Hammill*, 2 Park., 223; *Lonergan v. People*, 6 Park., 209; 50 Barb., 266; *People v. Rogers*, 18 N. Y., 9.)

(c) **Intoxication and premeditation.**—Where a prisoner when intoxicated committed a crime, the jury may not infer an absence of premeditation. (*O'Brien v. People*, 48 Barb., 274.)

(d) **Voluntary intoxication does not excuse.**—Voluntary intoxication is no excuse for crime, but the proof of it may reduce the crime of murder to the second degree, by showing the absence of deliberation. (*People v. Batting*, 49 How., 392.)

(e) **Intoxication and disease.**—Where intoxication results in a fixed mental disease of some continuance and duration, it will relieve from criminal responsibility. (*Lonergan v. People*, 6 Park., 209; 50 Barb., 266; *O'Brien v. People*, 48 Barb., 274; *People v. Williams*, 48 Cal., 344; *U. S. v. Drew*, 5 Mason, 28; *State v. McGonigal*, 5 Harring., 510.)

(f) **Delirium tremens.**—Delirium tremens, like insanity, if it deprive one of the capacity of knowing right from wrong, saves him from any criminal responsibility from his acts. (*O'Brien v. People*, 48 Barb., 274; see, also, *Real v. People*, 55 Barb., 551; 42 N. Y., 270; *Willis v. Com.* [Va.], 22 Alb. L. J., 176.)

(g) **Grade of crime affected by evidence of intoxication.**—In fixing the grade of crime of which the person is guilty, the evidence of his intoxication becomes very important, and is to be carefully weighed. (*People v. Batting*, 49 How., 392.)

§ 23. **Morbid criminal propensity.**—A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

New.

(a) **Irresistible impulse.**—If a person retain the use of his reason, there is no such thing as irresistible impulse to commit crime. (*People v. Walz*, 50 How., 204; see, also, *Huntington's case*.)

§ 24. **Rule as to married woman.**—It is not a defense, to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband.

New in form.

(a) **Responsibility of wife.**—A wife will not be held responsible for a larceny committed by her, by coercion of her husband or in his company, which presumes coercion; but the coercion of his company is only presumptive, and if it appear that she was not urged to the offense by him, but was herself the inciter of it, she is equally responsible. (19 Alb. L. J., 499.)

(b) **Preconcert in crime.**—Where there is a preconcert between husband and wife to commit a robbery, and she is present voluntarily aiding and abetting in the crime, she is responsible. (*Goodman's case*, 6 C. H. Rec., 21.)

(c) **Husband and wife.**—It has been held that a woman in the presence of her husband cannot be guilty of an assault and battery on one with whom her husband has a controversy. (*Brown's case*, 3 C. H. Rec., 56; *Rooney's case*, Id., 126.)

It is otherwise, however, if the husband does not participate. (*Boyd's case*, 3 C. H. Rec., 134; *Goldstein v. People*, 10 Week. Dig., 506; see *Quinlan v. People*, 6 Park., 9; *People v. Townsend*, 3 Hill, 479; *Brandon's case*, 4 C. H. Rec., 140.)

§ 25. Rule as to persons acting under threats, etc.—

Where a crime is committed or participated in by two or more persons, and is committed, aided, or participated in by any one of them, only because, during the time of its commission, he is compelled to do, or to aid or participate in the act, by threats of another person engaged in the act or omission, and reasonable apprehension on his part of instant death or grievous bodily harm, in case he refuses, the threats and apprehension constitute duress, and excuse him.

New.

(a) **Wife's coercion.**—A wife will not be held responsible for a larceny committed by her on coercion from her husband. (*Seiler v. People*, 19 Alb. L. J., 499; see, also, 1 Black. Com., 131.)

§ 26. Rule when act done in defense of self or another.

An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and the injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury.

New.

Code Crim. Proc., §§ 79, 80, 81; see, also, §§ 203, 204, 205, and 223 *post*.

(a) **Imminent danger.**—One without fault, if attacked by another, may kill his assailant, if the circumstances be such as furnish reasonable ground of a design to take his life or do him great bodily harm, though in point of fact he is mistaken. (*Shorter v. People*, 2 N. Y., 193; 4 Barb., 460; *Patterson v. People*, 46 Barb., 625; see *People v. Lamb*, 54 id., 342; 2 Keyes, 360; 2 Abb. [N. S.], 148; *People v. Austin*, 1 Park., 154; *People v. Cole*, 4 id., 35; *Pfommer v. People*, Id., 558; *Uhl v. People*, 5 id., 410.)

(b) **Must avoid attack if possible.**—Where, however, one believes himself about to be attacked, he must, if possible, avoid his assailant. (*People v. Sullivan*, 7 N. Y., 396; *People v. Cole*, 4 Park., 35.)

(c) **Must retreat.**—If a fatal blow be struck in self defense, the homicide is not justified, unless the accused first retreated as far as he could. (*People v. Harper*, Edm. S. C., 180; *Shorter v. People*, 2 N. Y., 193; 4 Barb., 460.)

(d) **Defense of property.**—One who is opposing a felony may lawfully use all necessary force, even to the killing of the felon. (*Ruloff v. People*, 45 N. Y., 213; 5 Lans., 261; 11 Abb. [N. S.], 245; *People v. Hand*, 4 Alb. L. J., 91.)

(e) **Party assailed may defend.**—A party assailed may seek the protection of the authorities, but his failure so to do does not deprive him of the right to defend himself in the same manner and to the same extent and by the same means as if he had done so. (*Evers v. People*, 3 Hun, 716; 63 N. Y., 625.)

(f) **Personal property.**—To what extent and in what way force may be used in defense of personal property. (*Gyre v. Culver*, 47 Barb., 592; *Morgan v. Durfee*, 21 Alb. L. J., 215.)

(g) **Freehold.**—To what extent and in what way force may be used in defending one's freehold. (*Corey v. People*, 45 Barb., 262; *Wood v. Phillips*, 45 N. Y., 152; *People v. Gulick*, Lalor, 129; *Harrington v. People*, 6 Barb., 60.)

§ 27. **Exemption of public ministers.**—Ambassadors and other public ministers from foreign governments, accredited to the president or government of the United States, and recognized according to the laws of the United States, with their secretaries, messengers, families and servants, are not liable to punishment in this state, but are to be returned to their own country for trial and punishment.

See United States Const., art. III., § 2; 1 Bish. Cr. Law, § 585; Wheaton's International Law, 264, § 6; Id., 271, § 14.

Under the treaty of 1871, an assault by one German citizen upon another on board a vessel in port is without the jurisdiction of the courts of this state, unless it disturbs the public peace. (*People v. Marine Court*, 6 Hun, 214.)

TITLE II.

OF PARTIES TO CRIMES.

- SECTION 28. Principal and accessory.
 29. Definition of principal.
 30. Definition of accessory.
 31. All principals in misdemeanors.
 32. Punishment of accessories.
 33. Punishment of accessories.

§ 28. **Principal and accessory.**—A party to a crime is, either

1. A principal; or,
2. An accessory.

New in form.

§ 29. **Definition of principal.**—A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

New.

2 Wharton's Cr. Law, § 206, *et seq.*; 1 Hale, 283, 613; *Vaugh's case*, 4 Co., 44 b; 1 Wharton's Cr. Law, § 211; 4 Black. Com., 36; 1 Bish. Cr. Law, § 648; *Pinkard v. State*, 30 Ga., 757; *State v. Shurtleff*, 18 Me., 368; *Breese v. State*, 12 Ohio, 146.

It will be seen that by this section accessory before the fact is substantially abolished.

There are no accessories in petit larceny; all concerned are principals. (*Ward v. People*, 3 Hill, 395, 396; 6 id., 144.)

(a) **Aiding and abetting.**—All those who aid or abet in the commission of a misdemeanor are principal offenders. (*People v. Erwin*, 4 Den., 129; *Lowenstein v. People*, 54 Barb., 299.)

(b) **House of prostitution.**—The owner of a house rented to be kept as a house of prostitution is deemed in law its keeper, and liable to indictment as principal. (*Lowenstein v. People*, 54 Barb., 299.)

(c) **Larceny.**—Where, on a trial for larceny, it appeared that the stolen property had not come to the prisoner's possession, but was received by C. on an order from the prisoner, the court charged the jury that if C. knew of the felonious intent on the part of the prisoner, they should find the prisoner not guilty, he being only an accessory before the fact. *Held*, on appeal, good law. (*People v. McMurray*, 4 Park., 234.)

(d) **Felony by an agent.**—A felony may be committed through an agent. If the agent is innocent the employer is the principal, otherwise not. (*Wizson v. People*, 5 Park., 120.)

(e) **Confederating to commit crime.**—All who confederate together in the commission of a felony, and are present aiding and assisting in its perpetration, are in judgment of law equally guilty. (*Carrington v. People*, 6 Park., 336; see, also, *People v. Katz*, 23 How., 98.)

§ 30. **Definition of accessory.**—A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony.

3 R. S., 989, § 7; 2 R. S. (Edm.), 721, 722, §§ 6, 7; see cases cited under last section.

§ 31. **All principals in misdemeanors.**—A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal, and may be indicted and punished as such, if the crime be a misdemeanor.

All those who aid or abet in the commission of a misdemeanor are principal offenders. (*Erwin v. People*, 4 Den., 129; *Ward v. People*, 3 Hill, 395; 6 id., 144; *Louenstein v. People*, 54 Barb., 299; see, also, § 682, *post*.)

§ 32. **Punishment of accessories.**—An accessory to a felony may be indicted, tried, and convicted, either in the county where he became an accessory, or in the county where the principal felony was committed, and whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction.

2 R. S. (Edm.), 751, §§ 48, 49; see § 126, *post*; see *People v. Gray*, 25 Wend., 464, and *Jones v. People*, 20 Hun, 545.

§ 33. **Punishment of accessories.**—Except in a case where a different punishment is specially prescribed by law, a person convicted as an accessory to a felony is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.

2 R. S., § 6; 2 R. S. (Edm.), 722, § 7.

TITLE III.

DEGREES IN THE COMMISSION OF CRIMES AND ATTEMPTS TO COMMIT CRIMES.

SECTION 34. What is an attempt to commit a crime.

35. Prisoner indicted may be convicted of lesser crime or attempt.

36. Acquittal or conviction bars indictment for another degree; attempt.

§ 34. **What is an attempt to commit a crime.** — An act, done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime.

2 R. S., 914, § 47; 2 R. S. (Edm.), 720, § 2; see § 685, *post*.

To constitute an attempt to commit a crime there must appear to have been more than the mere design or intention to commit it. (*People v. Lawton*, 56 Barb., 126.)

(a) **Solicitation.** — Mere solicitations to commit a crime do not constitute an attempt in law. (*Stable v. Com.* [Pa.], 22 Alb. L. J., 448; see, *contra*, *People v. Bush*, 4 Hill, 134.)

§ 35. **Prisoner indicted may be convicted of lesser crime or attempt.** — Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

3 R. S., 995, § 48; 3 R. S. (Edm.), 725, § 27; Code of Crim. Proc., §§ 444, 445.

(a) **Grades of crime.** — Power to punish by imprisonment in a state prison, upon a conviction for an attempt to commit a crime, is not limited to those cases where the imprisonment in a state prison, if the crime attempted had been consummated, must be for four years or more. (*Mackay v. People*, 1 Park., 459.)

(b) **Sentence of court.** — Where, by the statute, the imprisonment in the state prison for a commission of the crime attempted must be for a term less than four years, the person convicted of the attempt can only be sentenced to imprisonment in a county jail for not more than one year. (*Mackay v. People*, 1 Park., 459.)

(c) **Evidence of attempt.** — Evidence competent on the question of guilty or not guilty of the crime charged is competent to prove the attempt to commit it. (*People v. Lawton*, 56 Barb., 126.)

(d) **Burglary or attempt.** — A prisoner indicted for burglary may be convicted for an attempt to commit the crime. (Id.; see *People v. Jackson*, 3 Hill, 92; and *Dedieu v. People*, 22 N. Y., 178, distinguished in 80 id., 333.)

(e) **Similarity of crime.** — A conviction for a lesser degree of crime than that charged in the indictment is good, where the act itself proved is similar

to the one charged. (*Keefe v. People*, 40 N. Y., 348; *Dedieu v. People*, 22 id., 178; see, also, *People v. Saunders*, 4 Park., 196.)

(f) **Misdemeanor.**—Where a defendant is convicted of a misdemeanor, and that offense is sufficiently charged in the indictment, the conviction will be sustained, if otherwise valid, notwithstanding there is an allegation in the indictment of facts characterizing a higher crime. (*People v. Lohman*, 2 Barb., 216.)

(g) **Doubt as to degree.**—Where there is a reasonable doubt as to the degree of crime, the jury should convict of the lesser. (*People v. Lamb*, 2 Keyes, 360; 2 Abb., 148; 54 Barb., 342; see, also, *McKenna v. People*, 10 N. Y. W. Dig., 342.)

§ 36. Acquittal or conviction bars indictment for another degree; attempt.—Where a prisoner is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof.

2 R. S., 995, § 49; 2 R. S., (Edm.), 725, § 25; N. Y. State Const., art. I, § 6; also, 2 R. S. (Edm.), 701, § 24; Code Crim. Proc., §§ 340, 341.

(a) **Arrest of judgment.**—The arresting of judgment after conviction on an indictment for a felony is not a bar to a second indictment for the same offense. (*People v. Casborus*, 13 Johns., 351.)

(b) **Verdict of guilty of embezzlement.**—A verdict of guilty of embezzlement is equivalent to an acquittal of a larceny charged in the same indictment, and a bar to subsequent prosecution. (*Guenther v. People*, 24 N. Y., 100.)

(c) **Felony and misdemeanor.**—An acquittal on an indictment for a felony does not bar an indictment for a misdemeanor, or *vice versa*; and does not come within the statute referring to former acquittal or conviction. (*People v. Saunders*, 4 Park., 196; see, also, *People v. Dowling*, 23 Alb. L. J., 358.)

TITLE IV.

TREASON.

SECTION 37. Treason against the state defined.

38. Treason against the state, how punished.

39. Levying war defined.

40. Resistance to a statute when levying war.

§ 37. Treason against the state defined.—Treason against the people of the state consists in

1. Levying war against the people of the state, within this state; or

2. A combination of two or more persons by force to usurp the government of the state, or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or

3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed in the constitution of the United States, or giving to such enemies aid and comfort within the state or elsewhere.

2 R. S., 928, § 2; 2 R. S. (Edm.), 676, § 1; 1 R. L., 145, § 1.

(a) **Aiding and abetting.**—The offense of adhering and giving aid and comfort to the enemies of the United States is not treason against the State (*People v. Lynch*, 11 Johns., 549); and is not cognizable in the state courts. (*Id.*)

(b) **Warrant, contents of.**—A warrant for treason must set forth specially the treasonable acts charged. (1 Ch. L. N., 401.)

(c) **Entering service of enemies.**—(*Resp v. McCarthy*, 2 Dall., 86; *Roberts' case*, 1 id., 39). Resisting an act of congress. (*U. S. v. Hannay*, 2 Wall., Jr., 39.)

(d) **Deserting to enemy.**—Delivering up prisoners and deserters to the enemy is adhering to them and giving them aid and comfort, and is treason. (*U. S. v. Hodges*, 1 Wh. Cr. L., 477.)

§ 38. Treason against the state, how punished.—Treason is punishable by death.

2 R. S., 928, § 1; 2 R. S. (Edm.), 676, § 1; U. S. Const., art. III, § 3; N. Y. State Const., art IV, § 5; 1 R. L., 164, § 3, subd. 4; Code Crim. Proc., §§ 396, 397, 814, 826.

§ 39. Levying war defined.—To constitute levying war against the people of this state, an actual act of war must be committed. To conspire to levy war is not enough.

New.

To constitute the offense there must be a combination of numbers, accompanied, of course, by a use of force. (*Ex parte Bollman*, 4 Cranch, 75; and *Burr's Trial* (Coombs' ed.), 312; see 1 Bish. Cr. Law, § 1229; and *U. S. v. Hoxie*, 1 Paine, 265; *U. S. v. Greathouse*, 2 Abb., 364.)

§ 40. Resistance to a statute when levying war.—Where persons rise in insurrection with intent to prevent in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

New. See cases cited under last section.

U. S. v. Hannay, 2 Wall., Jr., 189, 203; *U. S. v. Mitchell*, 2 Dall., 348.

TITLE V.

OF CRIMES AGAINST THE ELECTIVE FRANCHISE.

§ 41. Crimes against the elective franchise are defined, and the punishment therefor prescribed by special statutes.

New.

TITLE VI.

OF CRIMES BY AND AGAINST THE EXECUTIVE POWER OF THE STATE.

- SECTION 42. Acting in a public office without having qualified.
43. Acts of officer *de facto*, not affected.
 44. Giving or offering bribes.
 45. Asking or receiving bribes.
 46. Attempting to prevent officers from performing duty.
 47. Resisting officers.
 48. Taking unlawful fees.
 49. Taking reward for omitting or delaying official acts.
 50. Taking fees for services not rendered.
 51. Taking unlawful reward for services in extradition of fugitives.
 52. Corrupt bargain for appointments, etc.
 53. Corrupt bargain for appointments, etc.
 54. Selling right to official powers.
 55. Such appointment avoided by conviction.
 56. Intrusion into public office.
 57. Offender refusing to surrender to successor.
 58. Administrative officers.

§ 42. Acting in a public office without having qualified.

A person who executes any of the functions of a public office without having taken and duly filed the required oath of office, or without having executed and duly filed the required security, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits his right to the office.

New. (1 R. L., 885, § 11; 1 R. S., 418; § 35.)

(a) **Must take the oath of office.**—A magistrate who acts as such without having first taken the oath of office is guilty of a misdemeanor, punishable by fine and imprisonment and forfeiture of office. (*Weeks v. Ellis*, 2 Barb., 821.)

(b) **Forfeiture of office.**—But until such forfeiture is judicially declared he is a magistrate *de facto*. (Id.; *People v. Collins*, 7 Johns., 549; *McKinstry v. Tanner*, 9 id., 135, *People v. Stevens*, 5 Hill, 617.)

(c) **Officer de facto.**—The acts of an officer *de facto* are valid.

(d) **Public protected.**—When they concern the public or third persons who have an interest in them. (*People v. Stevens*, 5 Hill, 617; *Weeks v. Ellis*, 2 Barb., 321; *People v. Collins*, 7 Johns., 549; *McKinstry v. Tanner*, 9 id., 135; *Foot v. Stiles*, 57 N. Y., 399.)

§ 43. **Acts of officer de facto not affected.**—The last section must not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

New.

(a) **Valid as to public.**—Acts of *de facto* officer valid as regards the public. (*Foot v. Stiles*, 57 N. Y., 399; *People v. Cook*, 14 Barb., 334; *Weeks v. Ellis*, 2 id., 324; *People v. Collins*, 7 Johns., 549; *McKinstry v. Tanner*, 9 id., 135; *People v. Stevens*, 5 Hill, 616.)

(b) **Color of right.**—An officer *de facto* is one who exercises the duties of an officer under color of right, as distinguished from a mere usurper. (*Rochester and Gen. Val. R. R. v. The Clark Nat. Bank*, 60 Barb., 234; *People v. Albertson*, 8 How., 363; *People v. Peabody*, 6 Abb., 228; *Conover v. Derlin*, 15 How., 470.)

(c) **Appointed officer.**—One who receives an appointment to office from a proper authority is an officer *de facto*, though his appointment is informal. (*Hamlin v. Dingman*, 5 Lans., 61.)

(d) **Constable executing process.**—A constable is justified in executing a process regular on its face, although the officer issuing such process be but an officer *de facto*. (*Wilcox v. Smith*, 5 Wend., 231; *Read v. Buffalo*, 3 Keyes, 445.)

A person elected to an office, but who neglects to give security and take the oath of office, is, nevertheless, a *de facto* official. (*Greenleaf v. Low*, 4 Den., 168.)

§ 44. **Giving or offering bribes.**—A person who gives or offers a bribe to any executive officer of this state with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or by both.

8 R. S., 957, § 9; 2 R. S. (Edm.), 703, § 9; 2 Laws 1867, p. 1793; *State v. Ellis*, 4 Vroom, 102.

§ 45. **Asking or receiving bribes.**—An executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon an agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, is punishable by

imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both; and in addition thereto forfeits his office and is forever disqualified from holding any public office under this state.

3 R. S., 957, § 10; 2 R. S. (Edm.), 703, § 10; 2 Laws 1869, p. 1793.

§ 46. Attempting to prevent officers from performing duty.—A person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, is guilty of a misdemeanor.

New. (See §§ 61, 62, 63 and 127, *post.*)

§ 47. Resisting officers.—A person who knowingly resists, by the use of force or violence, any executive officer, in the performance of his duty, is guilty of a misdemeanor.

New. (See § 124, *post.*)

§ 48. Taking unlawful fees.—An executive officer who asks or receives any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

3 R. S., 923, § 5; 2 R. S. (Edm.), 669, § 5; see Code Civ. Proc., § 1122.

(a) **Justice of the peace.**—If a justice give a judgment where he has no jurisdiction of the person of the defendant, and exact from him a sum of money, it is an indictable offense. (*People v. Whaley*, 6 Cow., 661.)

(b) **District attorney's costs.**—The taxation of a district attorney's costs account pursuant to a regular notice is a judicial act and cannot be questioned in an action against him by the county to recover back moneys received over and above his legal fees. (*Supervisors of Onondaga v. Briggs*, 2 Den., 26; *People v. Supervisors of N. Y.*, 1 Hill, 362.)

The determination of the board of supervisors is conclusive upon the county. (*Id.*)

(c) **Money voluntarily paid.**—Money voluntarily paid upon a claim of right, where there is no mistake of fact, cannot be recovered back. (*Id.*; see *Am. F. Ins. Co. v. Britton*, 8 Bosw., 148.)

(d) **Attorney.**—An indictment against an attorney for extorting more than his legal fees must state the sum due and the specified excess. (*People v. Rust*, 1 Caines, 130.)

(e) **Office not property.**—An office in this country is not property, and the prospective fees are not the property of the incumbent. (*Smith v. Mayor, etc.*, 37 N. Y., 518; distinguished, 80 N. Y., 190.)

(f) **Sheriff's fees.**—The sheriff is not entitled to any other fees than those expressly allowed by statute. (*Crofut v. Brandt*, 13 Abb., 128; *Palmer v. New York*, 2 Sandf., 318; *Lynch v. Meyers*, 3 Daly, 256.)

(g) **Constable.**—A constable taking fees beyond those allowed by law is liable to indictment for a misdemeanor. (*Parker v. Newland*, 1 Hill, 87.)

§ 49. Taking reward for omitting or delaying official acts.—An executive officer who asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, is guilty of a misdemeanor.

See 2 R. S. (Edm.), 669, 670, §§ 5 and 6.

§ 50. Taking fees for services not rendered.—An executive officer who asks or receives any fee or compensation for any official service which has not been actually rendered, except in cases of charges for prospective costs, or of fees demandable in advance in the cases allowed by law, is guilty of a misdemeanor.

3 R. S., 923, §§ 6 and 7; 2 R. S. (Edm.), 670, § 6.

(a) **Taxing costs.**—Where, upon the taxation of costs, items are charged and allowed by the taxing officer, when the services thus charged have not been performed, such taxation will not protect the solicitor from liability under the statute against receiving payment for services not rendered. (*Wendell v. Lewis*, 8 Paige, 613.)

(b) **Sheriff cannot recover for watchman's services.**—A sheriff cannot recover the expenses of a watchman, unless employed at the express instance of plaintiff (*Lynch v. Meyers*, 3 Daly, 256; *Lord v. Richmond*, 38 How. Pr., 173; *Crofut v. Brandt*, 46 id., 481; 13 Abb. [N. S.], 128; 47 How. Pr., 263.)

(c) **Justice taking fees in case where he has no jurisdiction.**—A justice is indictable for receiving fees in a case where he has no jurisdiction. (*People v. Whaley*, 6 Cow., 661.)

(d) **Constable indictable.**—So, also, a constable is indictable for taking fees beyond those allowed by law. (*Parker v. Newland*, 1 Hill, 87; see, also, cases cited under § 48, *ante*.)

§ 51. Taking unlawful reward for services in extradition of fugitives.—An officer of this state who asks or receives any fee or compensation of any kind for any service rendered or expense incurred in procuring from the governor of this state a demand upon the executive authority of a state or territory of the United States, or of a foreign government, for the surrender of a fugitive from justice; or for any service rendered or expense incurred in procuring the surrender of such fugitive, or of conveying him to this state, or for detaining him

therein, except upon an employment by the governor of this state, is guilty of a misdemeanor. (Amended 1882.)

New. (See Code Crim. Proc., §§ 836, 837.)

§ 52. Corrupt bargain for appointments, etc.—A person who gives or offers to give any gratuity or reward, in consideration that himself or any other person shall be appointed to a public office, or to a clerkship, deputation, or other subordinate positions, in such an office, or shall be permitted to exercise, perform, or discharge any prerogatives or duties, or to receive any emoluments of such an office, is guilty of a misdemeanor.

New in form. (See Laws 1863, ch. 51; 2 R. S. [Edm.], 719, § 86.)

(a) **Sheriff and deputy sheriff.**—An agreement by a deputy sheriff to allow to his principal a sum in gross, not payable out of the profits of the office, and which may therefore exceed such profits, is a violation of the statute. (*Becker v. Ten Eyck*, 6 Paige, 68; *Tappan v. Brown*, 9 Wend., 175.)

(b) **Deputy generally.**—Where the deputy of a public officer is by law entitled to certain fees in virtue of his office, if he agrees to give a portion of such fees to the officer appointing him, it is a purchase of the deputation. (*Id.*)

(c) **Agreement between candidates.**—An agreement made between A. and B., rival candidates for the same office, whereby A. was to withdraw and run for another office, B. promising to pay all his past and future expenses, held void. (*Robinson v. Kalbfleisch*, 5 N. Y. S. C., 212.)

(d) **Agreement between sheriff and his deputy.**—A sheriff may legally make an agreement with his deputy, or with the jailer appointed by him, for a division with him of the fees and profits of their employment. (*Becker v. Ten Eyck*, 6 Paige, 68; *Mott v. Robins*, 1 Hill, 21.)

(e) **Illegal contract.**—Where two persons apply to the governor of the state to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such a contract is illegal and void. (*Gray v. Hook*, 4 N. Y., 449.)

All agreements by which one person agrees to pay another for his aid or influence in procuring an appointment to office, are illegal and void. (*Id.*)

§ 53. Corrupt bargain for appointments, etc.—A person who asks or receives, or agrees to receive, any gratuity or reward, or any promise thereof, for appointing another person, or procuring for another person any appointment to a public office or to a clerkship, deputation, or other subordinate position in such an office, is guilty of a misdemeanor. If the person so offending is a public officer, a conviction also forfeits his office.

3 R. S., 977, §§ 64, 65; 2 R. S. (Edm.), 719, § 86; see cases cited under preceding section.

§ 54. **Selling right to official powers.**— A public officer who, for any reward, consideration or gratuity, paid, or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments or perform any of its duties, is guilty of a misdemeanor, and a conviction for the same forfeits his office and disqualifies him forever from holding any office whatever under this state.

3 R. S., 977, §§ 64, 65; 2 R. S. (Edm.), 918, § 35; see cases cited under § 53, *ante*.

§ 55. **Such appointment avoided by conviction.**— A grant, appointment, or deputation, made contrary to the provisions of either of the last two sections is avoided and annulled by a conviction for the violation of either of those sections, in respect to such grant, appointment, or deputation; but any official act done before conviction, is unaffected by the conviction.

3 R. S., 978, § 66; 2 R. S. (Edm.), 719, § 37.

§ 56. **Intrusion into public office.**— A person who willfully intrudes himself into a public office, to which he has not been duly elected or appointed, or who, having been an executive or administrative officer, willfully exercises any of the functions of his office, after his right so to do has ceased, is guilty of a misdemeanor.

New.

§ 57. **Offender refusing to surrender to successor.**— A person who, having been an executive or administrative officer, wrongfully refuses to surrender the official seal, or any books or papers, appertaining to his office, upon the demand of his lawful successor, is guilty of a misdemeanor.

1 R. S., 424, § 76.

(a) **Title to office must be clear.**— A judge has no right to enforce the delivery of books and papers unless the applicant's title to the office is clear and free from reasonable doubt. (*People v. Stevens*, 5 Hill, 616; *Devlin's case*, 5 Abb. Pr., 281.)

(b) **Warrant to compel delivery.**— A person holding office after the legal appointment of his successor, and refusing to deliver up books and papers, held a proper case for the issuing of a warrant under the statute. (*Matter of Whiting*, 2 Barb., 513; *Welch v. Cook*, 7 How., 282; *Matter of Baker*, 11 How., 418; *Matter of Davis*, 19 How., 823; *In re Bartlett*, 9 How., 414.)

(c) **Possession.** — What constitutes possession of a public office. (*Conover's case* 5 Abb. Pr., 73; *Cobee v. Davis*, 8 How., 367; *People v. Dikeman*, 7 id., 367.)

§ 58. **Administrative officers.** — The various provisions of this chapter which relate to executive officers apply to administrative officers, in the same manner as if administrative and executive officers were both mentioned.

New.

TITLE VII.

OF CRIMES AGAINST THE LEGISLATIVE POWER.

SECTION 59. Preventing the meeting or organization of either branch of the legislature.

60. Disturbing the legislature while in session.
61. Compelling adjournment.
62. Intimidating a member of the legislature.
63. Compelling either house to perform or omit any official act.
64. Altering draft of bill.
65. Altering engrossed copy.
66. Bribery of members of legislature.
67. Receiving bribes by members of legislature.
68. Witnesses refusing to attend before the legislature or legislative committees.
69. Refusing to testify.
70. Members of the legislature liable to forfeiture of office.

§ 59. **Preventing the meeting or organization of either branch of the legislature.** — A person who willfully and by force or fraud prevents the legislature of this state, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is punishable by imprisonment in a state prison not less than five years nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

New.

§ 60. **Disturbing the legislature while in session.** — A person who willfully disturbs the legislature of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house of the legislature, tending to interrupt its pro-

ceedings or impair the respect due to its authority, is guilty of a misdemeanor.

New.

§ 61. **Compelling adjournment.** — A person who willfully and by force or fraud compels or attempts to compel the legislature of this state, or either of the houses composing it, to adjourn or disperse, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by fine of not less than five hundred dollars, nor more than two thousand dollars, or by both.

New.

§ 62. **Intimidating a member of the legislature.** — A person who willfully, by intimidation or otherwise, prevents any member of the legislature of this state, from attending any session of the house of which he is a member, or of any committee thereof, or from giving his vote upon any question which may come before such house, or from performing any other official act, is guilty of a misdemeanor.

New. (See §§ 46, 127.)

§ 63. **Compelling either house to perform or omit any official act.** — A person who willfully compels or attempts to compel either of the houses composing the legislature of this state to pass, amend or reject any bill, or resolution, or to grant or refuse any petition, or to perform or omit to perform any other official act, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

New.

§ 64. **Altering draft of bill.** — A person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

New.

§ 65. **Altering engrossed copy.**— A person who fraudulently alters the engrossed copy or enrollment of any bill which has been passed by the legislature of this state, with intent to procure it to be approved by the governor or certified by the secretary of state, or printed or published by the printer of the statutes in language different from that in which it was passed by the legislature, is guilty of felony.

New.

§ 66. **Bribery of members of the legislature.**— A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a member of the legislature, or attempts, directly or indirectly, by menace, deceit, suppression of truth, or other corrupt means, to influence a member to give or withhold his vote, or to absent himself from the house of which he is a member, or from any committee thereof, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

3 R. S., 957, § 9; 2 R. S. (Edm.), 703, § 9; Laws 1853, ch. 539; 2 Wharton's Crim. Law, §§ 1857, 1858; N. Y. State Const., art. XV., §§ 1, 2, 3; *Sulston v. Norton*, 3 Burr, 1235; *State v. Ellis*, 4 Vroom, 102.

§ 67. **Receiving bribes by members of legislature.**— A member of either of the houses composing the legislature of this state, who asks, receives, or agrees to receive, any bribe upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or who gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both.

3 R. S., 957, § 10; 2 R. S. (Edm.), 703, § 10, Laws 1853, ch. 539; N. Y. Const., §§ 1, 2, 3; 2 Wharton's Crim. Law, §§ 1857, 1858; *Sulston v. Norton*, 3 Burr, 1235; *Marshall v. Balt. and O. R. R. Co.*, 16 How. [U. S.] R., 314; *Fuller v. Dame*, 18 Pick., 470; *Hatsfield v. Guldson*, 7 Watts, 152; *Wood v. McCarr*, 6 Dana, 366; *Walsh v. People*, 68 Ill., 58; *Com. v. Callahan*, 2 Va. Cas., 460; *Hunt v. Test*, 8 Ala., 719.

§ 68. **Witnesses refusing to attend before the legislature or legislative committees.** — A person who, being duly summoned to attend as a witness before either house of the legislature or any committee thereof, authorized to summon witnesses, refuses or neglects without lawful excuse to attend pursuant to such summons, is guilty of a misdemeanor.

1 R. S., 512, § 20; *Id.*, 517, § 22; 2 R. S. (Edm.), 704, § 14a; N. Y. Const., art. XV, § 8; Laws 1853, ch. 537.

§ 69. **Refusing to testify.** — A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, willfully refuses to be sworn or affirmed, or to answer any material or proper question, or to produce upon reasonable notice any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor.

1 R. S., 512, § 20; 2 R. S. (Edm.), 704, § 15a; Laws 1853, ch. 539.

§ 70. **Members of the legislature liable to forfeiture of office.** — The conviction of a member of the legislature of either of the crimes defined in this chapter, involves as a consequence in addition to the punishment prescribed by this Code, a forfeiture of his office; and disqualifies him from ever afterwards holding any office under this state.

3 R. S., 957, § 10; 2 R. S. (3 Edm.), 703, § 10.

TITLE VIII.

OF CRIMES AGAINST PUBLIC JUSTICE.

- CHAPTER**
- I. Bribery and corruption.
 - II. Rescues.
 - III. Escapes and aiding therein.
 - IV. Forging, stealing, mutilating and falsifying judicial and public records and documents.
 - V. Perjury and subornation of perjury.
 - VI. Falsifying evidence.
 - VII. Other offenses against public justice.
 - VIII. Conspiracy.

CHAPTER I.

BRIBERY AND CORRUPTION.

- SECTION**
- 71. Bribery of a judicial officer.
 - 72. Officer accepting bribe.
 - 73. Juror, etc., promising verdict.
 - 74. Juror, etc., accepting bribes.
 - 75. Embracery.
 - 76. Misconduct of officers at drawing of jurors.
 - 77. Misconduct of officers having charge of juries.
 - 78. Certain punishments.
 - 79. Offender a competent witness, etc.
 - 80. Bribery of witnesses.
 - 81. Definition of "jurors."

§ 71. **Bribery of a judicial officer.**—A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a judicial officer, juror, referee, arbitrator, appraiser, or assessor, or other person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereupon, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

3 R. S., 957, § 9; 2 R. S. (Edm.), 703, § 9; 4 Bl. Com., 189; 2 Wharton Crim. Law, § 1857; *State v. Carpenter*, 20 Vt., 9; 1 Hawk. P. C., bk. 1, ch. 67, § 6; *State v. Ellis*, 4 Vroom (N. J.), 102.

§ 72. **Officer accepting bribe.**—A judicial officer, a person who executes any of the functions of a public office not designated in titles six and seven of this Code, or a person employed

by or acting for the state, or for any public officer in the business of the state, who asks, receives, or agrees to receive a bribe, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the state.

3 R. S., 957, § 10; 2 R. S. (Edm.), 703, § 10; 2 Wharton Cr. Law, § 1857.

§ 73. Juror, etc., promising verdict.—A juror, or a person drawn or summoned to attend as a juror, or a person chosen arbitrator, or appointed referee, who either,

1. Makes any promise or agreement to give a verdict, judgment, report, award or decision, for or against any party; or

2. Willfully receives any communication, book, paper, instrument or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of that cause or matter;

Is guilty of a misdemeanor.

2 R. S. (Edm.), 703, § 12; Id., 694, § 16; Code Civ. Proc., § 1122.

§ 74. Juror, etc., accepting bribes.—A juror, referee, arbitrator, appraiser or assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy, or proceeding, who asks, receives, or agrees to receive, any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, is punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both.

3 R. S., 957, § 11; 2 R. S. (Edm.), 704, § 11; 3 id., 693, § 17; Id., 487, § 70; Code Civ. Proc., § 1193; 1 R. L., 834, § 26.

§ 75. Embracery.—A person who influences or attempts to influence improperly a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as such a juror, or one chosen an arbitrator, or appointed a referee in respect to his

verdict, judgment, report, award or decision, in any cause or matter pending or about to be brought before him, in any case, or in any manner not included in the last two sections, is guilty of a misdemeanor.

8 R. S., 958, § 12; 2 R. S. (Edm.), 704, § 13a; Laws 1853, ch. 539; Code Civ. Proc., § 1194; 2 R. S. (Edm.), 439, § 71. Embracery defined. (*Gibbs v. Dewey*, 5 Cow., 503.)

(a) **Conversing with juror.** — Effect of conversing with one of the jurors during address of counsel. (*Turner v. Beardsley*, 19 Wend., 348; *State v. Sales*, 2 Nev., 289; *Rez v. Opie et al.*, 1 Saund., 301.)

(b) **Improper interference.** — The least intermeddling or improper interference with a jury, or any of them, by a party during the trial, will vitiate the verdict. (*Reynolds v. The Champlain Trans. Co.*, 9 How., 7; see *Baker v. Simmons*, 29 Barb., 198.)

§ 76. **Misconduct of officers at drawing of jurors.** — A person authorized by law to assist at the drawing or impaneling of grand or trial jurors to attend a court, or a term of a court, or to try any cause or issue, who either

1. Designedly puts, or consents to the putting, upon a list of jurors as having been drawn, any name which was not lawfully drawn for that purpose; or

2. Designedly omits to place on such a list any name which was lawfully drawn; or

3. Designedly signs or certifies a list of such jurors as having been drawn which was not lawfully drawn; or

4. Designedly withdraws from the box, or other receptacle for the ballots containing the names of such jurors, any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omits to place in such box or receptacle any name lawfully drawn or designated, or places in such box or receptacle a paper or ballot containing the name of a person not lawfully drawn and designated as a juror; or

5. In the drawing of such jurors, does any act which is unfair, partial or improper in any other respect;

Is guilty of a misdemeanor.

But this section shall not apply to the city and county of New York or the county of Kings.

8 R. S., 972, § 18; 2 R. S. (Edm.), 716, § 18; Code Civ. Proc., § 1122.

§ 77. **Misconduct of officer having charge of juries.** — An officer to whose charge any juror is committed by a court or

magistrate, who negligently or willfully permits them, or any of them, without leave of the court or magistrate

1. To receive any communication from any person ;
 2. To make any communication to any person ;
 3. To obtain or receive any book or paper, or refreshment ; or
 4. To leave the jury room,
- Is guilty of a misdemeanor.

New.

(a) **Interference by constable.** — Where a constable having a jury in charge interferes with their deliberations and urges them to give a verdict for the prevailing party, it does not vitiate the verdict. (*Baker v. Simmons*, 29 Barb., 198; *Thomas v. Chapman*, 45 Barb., 98; see, also, *Taylor v. Everett*, 2 How., 23.)

(b) **Impeaching verdict.** — The affidavit of a juror cannot be received to impeach the verdict, nor to prove misconduct either on his own part or that of his fellows. (*Clum v. Smith*, 5 Hill, 560; *Thomas v. Chapman*, 45 Barb., 98.) But such affidavits may be received to exculpate the jurors, or in support of their verdict. (*Dana v. Trucker*, 4 Johns., 487.)

(c) **Spirituous liquors to jurors.** — Effect of allowing jurors to drink spirituous liquors while trying a cause. (*Wilson v. Abrahams*, 1 Hill, 207; *Brant v. Fowler*, 7 Cow., 562; *Kellogg v. Wilder*, 15 Johns., 455; *Rose v. Smith*, 4 Cow., 17.)

(d) **Improper separation of jury.** — Where jury separates improperly after having informed officer that they had agreed. (*Oliver v. Trustees*, 5 Cow., 288.)

§ 78. Certain punishments.— A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a person executing any of the functions of a public office, other than one of the officers or persons designated in title six, title seven and section seventy-one of title eight of this Code, with intent to influence him in respect to any act, decision, vote or other proceeding, in the exercise of his powers or functions, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

3 R. S., 957, § 9; 2 R. S. (Edm.), 704, § 9; Laws 1853, ch. 539; 2 Laws 1869, p. 1798; see, also, § 418, *post*.

§ 79. Offender a competent witness, etc. — A person offending against any provision of any foregoing sections of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation, in the same

manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution.

3 R. S., 958, § 14; 2 R. S. (Edm.), 704, § 14a; Laws 1853, ch. 539; see, also, *post*, § 712.

§ 80. **Bribery of witnesses.**—A person who is, or is about to be, a witness upon a trial, hearing or other proceeding, before any court or any officer authorized to hear evidence or take testimony, who receives, or agrees, or offers to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, is guilty of a felony.

New. (2 R. S. [Edm.], 704, §§ 8 and 8; also § 112, *post*.)

§ 81. **Definition of "jurors."**—The word "juror" as used in this chapter includes a talesman, and extends to jurors in all courts, whether of record or not of record, and in special proceedings, and before any officer authorized to impanel a jury, in any case or proceeding.

New.

CHAPTER II.

RESCUES.

SECTION 82. Rescue of prisoner.

82. Taking, etc., property in officer's custody.

§ 82. **Rescue of prisoner.**—A person who, by force or fraud, rescues a prisoner from lawful custody, or from an officer or other person having him in lawful custody, is guilty of a felony, if the prisoner was held upon a charge, commitment, arrest, conviction or sentence of felony; and if the prisoner was held upon a charge, arrest, commitment, conviction or sentence for misdemeanor, the rescuer is guilty of a misdemeanor.

3 R. S., 960, § 26; Code Civil Proc., § 14, subd. 4; Id., § 587; Laws 1887, ch. 457.

(a) **Laying in wait to rescue.**—Laying in wait near a jail for the purpose of conveying away a prisoner, is a misdemeanor at common law; but it

is not aiding the prisoner to escape under the statute. (*People v. Tompkins*, 9 Johns., 70.)

(b) **Felony.**—A defendant not indictable under the statute, unless it appear that the prisoner was committed on a distinct charge of felony. (*People v. Washburn*, 10 Johns., 160; see, also, *People v. Rose*, 12 id., 339.)

(c) **Common-law offense.**—An offense at common law. (2 Hawk. P. C., ch. 18, § 10; 4 Black. Com., 181; *State v. Hilton*, 26 Mo., 199.)

(d) **Advising another to escape.**—It is competent in a prosecution to prove that the prisoner advised an accomplice to break jail and escape. (*People v. Rathbun*, 21 Wend., 508.)

§ 83. **Taking, etc., property in officer's custody.**—A person who takes from the custody of an officer or other person personal property, in charge of the latter, under any process of law, or who willfully injures or destroys such property, is guilty of a misdemeanor.

New. (See Code Civil Proc., § 14, subd., 4; Id., § 587; 2 R. S. [Edm.], 519, § 23; 1 R. L., 411, § 16; Laws 1837, p. 521, ch. 457.)

CHAPTER III.

ESCAPES, AND AIDING THEREIN.

SECTION 84. Escaping prisoner may be recaptured.

85. Prisoner escaping.

86. Attempt to escape from state prison.

87. Aiding escape.

88. Aiding escape.

89. Officer suffering escape.

90. Officer suffering escape forfeits office.

91. Concealing escaped prisoner.

92. Definition of prison.

93. Definition of prisoner.

§ 84. **Escaping prisoner may be recaptured.**—A prisoner, in custody under sentence of imprisonment for any crime, who escapes from custody, may be recaptured and imprisoned for a term equal to that portion of his original term of imprisonment which remained unexpired upon the day of his escape.

3 R. S., 961, § 32; Id., 1067, § 148; 2 R. S. (Edm.), 707, § 20; 1 R. L., 411, § 16; Laws 1837, p. 521, ch. 457; Code Crim. Proc., § 186.)

(a) **Duty of sheriff.**—Duty of sheriff with reference to escaped prisoner. (*French v. Willett*, 10 Bosw., 566, 583; *Brown v. Tracy*, 9 How., 93.)

(b) **Escaped prisoner, before term expires.**—In a case where, before the term of imprisonment, the prisoner escapes, no new award of execution is

necessary or proper. He may be retaken at any time and confined under the original judgment. (*Haggerty v. People*, 53 N. Y., 476; 6 Lans., 332.)

As to former law on the subject, see *People v. Duell* (3 Johns., 449); see, also, *Nall v. State* (34 Ala., 262); *Riley v. State* (16 Conn., 47).

§ 85. **Prisoner escaping.** — A prisoner who, being confined in a prison, or being in lawful custody of an officer or other person, by force or fraud escapes from such prison or custody, is guilty of felony if such custody or confinement is upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor if such custody or confinement is upon a charge, arrest, commitment or conviction for a misdemeanor.

3 R. S., 962, §§ 3, 4, 5; 2 R. S. (Edm.), 707, § 21; 1 R. L., 411, § 15.

(a) **One prisoner aiding another.** — A prisoner who attempts to escape by breaking prison, in consequence of which a fellow prisoner confined for a felony escapes, is guilty of aiding the latter to escape. (*People v. Rose*, 12 Johns., 339.)

(b) **Escaped prisoner has no standing in court.** — An escaped prisoner can take no action in any court. (*People v. Genet*, 59 N. Y., 80; 97 Mass., 505; 31 Me., 592.)

(c) **Writ of error and escape of prisoner.** — A writ of error will not be quashed on motion of the people, though it appear that after the allowance of such writ the prisoner escaped and fled the jurisdiction of the court. (*People v. Sharkey*, 1 Hun, 300; see, also, cases cited under preceding section.)

§ 86. **Attempt to escape from state prison.** — A prisoner confined in a state prison for a term less than for life, who attempts by force or fraud, although unsuccessfully, to escape from such prison, is guilty of felony.

3 R. S., 962, §§ 33, 34, 35; 2 R. S. (Edm.), 707, § 23.

A prisoner who, in attempting to escape, permits a fellow prisoner to escape is guilty of aiding the latter. (*People v. Rose*, 12 Johns., 339; see, also, *Luke v. State*, 49 Ala., 30; and cases cited under § 84, *ante*.)

§ 87. **Aiding escape.** — A person who, with intent to effect or facilitate the escape of a prisoner, whether the escape is effected or attempted or not, enters a prison, or conveys to a prisoner any information, or sends into a prison any disguise, instrument, weapon, or other thing, is guilty of felony, if the prisoner is held upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor, if the prisoner is held upon a charge, arrest, commitment, or conviction for a misdemeanor.

3 R. S., 96, §§ 25, 29; 2 R. S. (Edm.), 705, §§ 133, 143, 153.

(a) **Misdemeanor at common law.** — Lying in wait near a jail for the purpose of conveying away a prisoner, though a misdemeanor at common

law, is not aiding a prisoner to escape under the statute. (*People v. Thompson*, 9 Johns., 70.)

(b) **Breaking prison and aiding others.**—A prisoner who attempts to escape by breaking prison, in consequence of which a fellow prisoner escapes, is guilty of aiding the latter in escaping. (*People v. Rose*, 12 Johns., 339.)

§ 88. **Aiding escape.**—A person who aids or assists a prisoner in escaping, or attempting to escape, from the lawful custody of a sheriff, or other officer or person, is guilty of a misdemeanor, if the prisoner is held under arrest, commitment, or conviction for a misdemeanor, or upon a charge thereof; and of a felony if the prisoner is held under an arrest, commitment, or conviction for a felony, or upon a charge thereof.

3 R. S., 960, §§ 25, 29; 2 R. S. (Edm.), 707, § 17.

Held, that a defendant was not indictable under the former statute for aiding a prisoner to escape, unless it appear that the latter was committed on a distinct charge of felony. (*People v. Washburn*, 10 Johns., 160; *People v. Rose*, 12 id., 339; *People v. Tompkins*, 9 id., 70.)

§ 89. **Officer suffering escape.**—A sheriff, or other officer or person, who allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large, except as permitted by law, or connives at or assists such escape, or omits an act or duty whereby such escape is occasioned, or contributed to, or assisted, is,

1. If he corruptly and willfully allows, connives at, or assists the escape, guilty of a felony;

2. In any other case, is guilty of a misdemeanor.

3 R. S., 960, § 30; 2 R. S. (Edm.), 707, § 18; see §§ 58 *ante*, and §§ 114, 115 *post*, and *State v. Erickson*, 32 N. J., 421.

(a) **Evidence of escape.**—That a prisoner is seen at large is *prima facie* evidence of an escape on the part of the sheriff. (*Steward v. Kipp*, 7 Johns., 165.)

(b) **Escape defined.**—If a deputy sheriff arrest a defendant and leave him in custody of persons who have no authority to detain him it is an escape. (*Palmer v. Hatch*, 9 Johns., 328.)

(c) **Id.**—If the sheriff discharge a prisoner from arrest on a *ca. sa.* by order of the plaintiff's attorney, without payment of the execution, it is an escape. (*Lovell v. Orser*, 1 Bosw., 349.)

(d) **Privilege from arrest.**—It is a good defense to an action for an escape that the prisoner was privileged from arrest. (*Ray v. Hogeboom*, 11 Johns., 433; *Phelps v. Barton*, 13 Wend., 68.)

(e) **Leaving jail limits.**—If the sheriff's jailer permits a prisoner in execution to leave the jail limits it is an escape and furnishes a complete

defense to the sureties in an action upon the bond given for the limits. (*Wemple v. Glavin*, 5 Abb. N. C., 360; 57 How., 109.)

(*f*) **Voluntary and negligent escape.**—The distinction between a voluntary and negligent escape. (*Lockwood v. Mercereau*, 6 Abb. Pr., 206.)

A suit against the sheriff for an escape is an election on the part of the plaintiff to consider the prisoner out of custody. (*Brown v. Littlefield*, 1 Wend., 398.)

(*g*) **Escape from civil process.**—What constitutes an escape on civil process. (*Kellogg v. Gilbert*, 10 Johns., 220; *Lovell v. Orser*, 1 Bosw., 349; *Stone v. Woods*, 5 Johns., 182; *Olmstead v. Raymond*, 6 id., 62; *Wool v. Turner*, 10 id., 420; *Turney's case*, 5 Ch. Rec., 135; *Wheeler v. Bailey*, 13 Johns., 366; *Dexter v. Adams*, 2 Den., 646; *Day v. Brett*, 6 Johns., 22.)

(*h*) **New process.**—If the sheriff suffer a defendant in execution to escape without consent of the plaintiff, the latter may issue a new process and retake the debtor. (*Wesson v. Chamberlain*, 3 N. Y., 331.)

§ 90. **Officer suffering escape forfeits office.**—An officer who is convicted of the offense specified in the first subdivision of the last section, forfeits his office, and is forever disqualified to hold any office or place of trust, honor or profit, under the constitution or laws of this state.

3 R. S., 960, § 81; 2 R. S. (Edm.), § 19.

§ 91. **Concealing escaped prisoner.**—A person who knowingly or willfully conceals, or harbors for the purpose of concealment, a person who has escaped or is escaping from custody, is guilty of a felony if the prisoner is held upon a charge or conviction of felony, and of a misdemeanor if the person is held upon a charge or conviction of misdemeanor.

2 R. S. (Edm.), 705, § 155.

§ 92. **Definition of prison.**—The term "prison," as used in this chapter, means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest.

New. (2 Wharton's Crim. Law, § 1675; *Com. v. Felburn*, 119 Mass., 297; *State v. Beebe*, 13 Kansas, 589; *R. v. Bootie*, 2 Burr, 864.)

§ 93. **Definition of prisoner.**—The term "prisoner," as used in this chapter, means any person held in custody under process of law, or under lawful arrest.

New in form.

CHAPTER IV.

FORGING, STEALING, MUTILATING AND FALSIFYING JUDICIAL AND
PUBLIC RECORDS AND DOCUMENTS.

SECTION 94. Injury, etc., to public record.

95. Offering false or forged instruments to be filed or recorded.

§ 94. **Injury, etc., to public record.**— A person who willfully and unlawfully removes, mutilates, destroys, conceals or obliterates a record, map, book, paper, document, or other thing, filed or deposited in a public office or with any public officer by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.

See 2 R. S. (Edm.), 700, §§ 69, 70; see § 114, *post*

The value of the book or paper is no importance, but must be a paper, proceeding or record of a court. (*Ayres v. Covill*, 18 Barb., 263.)

§ 95. **Offering false or forged instruments to be filed or recorded.**— A person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed or registered or recorded under any law of this state or of the United States, is guilty of felony.

New.

CHAPTER V.

PERJURY AND SUBORNATION OF PERJURY.

SECTION 96. Perjury.

97. Irregularities in the mode of administering oaths.

98. Incompetency of witness no defense for perjury.

99. Witness' knowledge of materiality of his testimony not necessary.

100. Making of deposition, etc., when deemed complete.

101. Statement of that which one does not know to be true.

102. Summary committal of witnesses who have committed perjury.

103. Witnesses necessary to prove the perjury, may be bound over to appear.

104. Documents necessary to prove such perjury may be detained.

105. Subornation of perjury defined.

106. Punishment of perjury and subornation.

§ 96. **Perjury.**— A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony,

declaration, deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, willfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit or certificate, any material matter to be true which he knows to be false, is guilty of perjury.

3 R. S., 955, § 1; 2 R. S. (Edm.), 701, § 1; Code Civil Proc., § 851; 1 R. L., 171, § 1; *Com. v. Ballard*, 12 Met. (Mass.), 235.

(a) **False swearing.**—False swearing is perjury, when done before an officer who has cognizance of the matter inquired into, and upon a fact material to the inquiry. (*Harris v. People*, 6 S. C., 206.)

(b) **Competent official.**—To constitute perjury the oath must be taken before some person competent to administer it. (*Wood's case*, 4 C. H. Rec., 180.)

(c) **Illegal court.**—Not perjury before a court illegally constituted. (*People v. Tracy*, 9 Wend., 265.)

(d) **Arbitrators.**—Nor before arbitrators, unless the submission be according to statute. (*People v. Townsend*, 5 How., 315.)

(e) **Willful and corrupt.**—The false swearing must be willful and corrupt. (*Elwell's case*, 1 C. H. Rec., 155.)

(f) **Materiality.**—And must be material to the matter in issue. (*Pendergraft's case*, 3 C. H. Rec., 11; *Geston v. People*, 4 Lans., 487; 61 Barb., 85.)

(g) **Knowledge.**—A man may be convicted of perjury in swearing that he believes a fact to be true which he knows to be false. (*People v. Robertson*, 8 Wh. Cr. Cas., 180.)

(h) **Immateriality.**—If the matter sworn to be in fact immaterial, it is not perjury, though the witness believes it to be so. (*Rouse v. Ross*, 1 Wend., 475.)

(i) **False testimony.**—False testimony as to a material fact is perjury, though the witness is incompetent. (*Chamberlain v. People*, 23 N. Y., 85.)

(j) **Want of knowledge.**—A person may commit perjury by testifying to something true in fact, if he has no knowledge whether it is true or false. (*People v. McKinney*, 3 Park., 510; *Van Steenburgh v. Korte*, 10 Johns., 167.)

(k) **Exemption from execution.**—Perjury may be assigned on an oath taken to obtain exemption from execution. (*Gilbert's case*, 1 C. H. Rec., 163.)

(l) **Justifying bail.**—Or on an oath taken in justifying as bail. (*Tomlinson's case*, 4 id., 125.) Or on an affidavit to found a *certiorari*. (*Pratt v. Price*, 11 Wend., 127.)

(m) **Subscribing witness.**—Or as subscribing witness to the execution of a deed. (*Tuttle v. People*, 36 N. Y., 431.)

(n) **Extra-judicial oath.**—Perjury cannot be assigned on an extra-judicial oath. (*Wood's case*, 4 C. H. Rec., 130.)

(o) **Protest.**—Or on a false oath to a protest before a notary public as part of the preliminary proofs in a case of marine loss. (*People v. Travis*, 4 Park., 213; 1 Sheld., 545.)

(p) **Indictments for perjury.**—Requisites of a valid indictment for perjury as a witness in court. (*Gaston v. People*, 4 Lans., 487; 61 Barb., 35.)

(q) **On false affidavit.**—Requisites of an indictment for perjury on an affidavit. (*People v. Robertson*, 3 Wh. Crim. Cas., 180.)

(r) **Regarding usury.**—Or in falsely swearing that usury was taken in discounting a note. (*People v. Burroughs*, 1 Park., 211.)

(s) **Revised Statutes.**—Requisites of an indictment for perjury under the Revised Statutes. (*People v. Phelps*, 5 Wend., 9; *People v. Warner*, Id., 271; *Campbell*, 8 id., 636; *People v. Tredway*, 3 Barb., 460; *Burns v. People*, 59 id., 531; 5 Lans., 189.)

(t) **Materiality of matter.**—If the materiality of the matter sworn to appear on the face of the indictment, it need not be expressly averred. (*Tomlinson's case*, 4 C. H. Rec., 125.)

(u) **Before inspectors of election — Indictment.**—Requisites of an indictment for perjury before inspectors of election. (*Burns v. People*, 5 Lans., 189; 59 Barb., 531; *People v. Cook*, 8 N. Y., 87.)

(v) **False voting.**—Or against a voter at an election. (*Campbell v. People*, 8 Wend., 636.)

(w) **Falsity of oath must be proved.**—The falsity of the oath must be proved by two witnesses, but the materiality of the testimony is to be deduced from all the circumstances of the case. (*Johnson's case*, 1 C. H. Rec., 21.) Or by one witness supported by strong corroborating circumstances. (*Merritt's case*, 4 C. H. Rec., 58.)

(x) **Contradictory depositions.**—Where a defendant has made two contradictory depositions, and the second shows that the first was intentionally false, this is sufficient to convict him of perjury in swearing to the former deposition. (*People v. Burden*, 9 Barb., 467.)

(y) **Pendency of the cause shown by the record.**—The pendency of the cause on the trial of which perjury was assigned, must be proved by the record. (*Jarvis' case*, 1 C. H. Rec., 191.)

(z) **Variance.**—What is such variance between indictment and evidence as will entitle prisoner to discharge. (*Smith v. People*, 1 Park., 317.)

(1) **Perjury before a fire marshal.**—What constitutes perjury before a fire marshal. (*Harris v. People*, 64 N. Y., 148.)

(2) **Defect of proof.**—If a witness swears falsely in respect to any material fact he is guilty of perjury, though the case fail from defect of proof in other essentials. (*Wood v. People*, 59 N. Y., 117; 1 Hun, 331.)

(3) **Denying immaterial allegation.**—Not perjury where defendant's verification to answer denies an immaterial allegation of complaint. (*People v. Christopher*, 4 Hun, 805.)

(4) **Information and belief.**—Swearing to a statement as being true to the best of affiant's knowledge, information and belief, not perjury. (*People v. Lambert*, 6 Abb. N. C., 181; reversing, 14 Hun, 512.)

Nor upon an affidavit before an officer *de facto*. (*Id.*)

(5) **Bank officer.**—If a bank officer make willful false statements in his report to the superintendent of the banking department, he is guilty of perjury. (*People v. Vail*, 57 How., 81; 6 Abb. N. C., 206.)

(6) **Soliciting another to commit perjury.**—It is not essential to the validity of an indictment for subornation of perjury that it should aver that the accused solicited the other person to commit perjury. (*Stratton v. People*, 81 N. Y., 629.)

(7) **Before referee.**—As to the sufficiency of a referee's appointment before whom the perjury is said to have been committed. (*Elghmy v. People*, 21 Alb. L. J., 115; 79 N. Y., 546.)

§ 97. Irregularities in the mode of administering oaths.

It is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner. The term "oath," includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

3 R. S., 673, § 137; Code Civil Proc., §§ 842-849.

(a) **An oath administered irregularly, *e. g.***, upon a book other than the Bible, the parties administering and taking it supposing it to be a Bible, is valid. (*People v. Cook*, 8 N. Y., 84; 14 Barb., 287.)

(b) **Duly sworn.**—There being the ordinary jurat that affiant was duly sworn, the presumption is that he was so sworn. (*Fryatt v. Linde*, 3 Edw., 239.)

(c) **Not appearing before the officer.**—Where the affiant does not appear before the officer, he is not guilty of perjury. (*Case v. People*, 76 N. Y., 242.)

(d) **Erroneously taken oath.**—It seems the perjury may be assigned upon an oath erroneously taken. (*Van Steenburgh v. Korte*, 10 Johns., 167.)

(e) **Requisites to a valid oath.**—*People v. O'Reilly*, 61 How. Pr., 8; reversed in 24 Alb. L. J., 812 (Ct. App.).

§ 98. Incompetency of witness no defense for perjury.—

It is no defense to a prosecution for perjury that the defendant was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he actually was permitted to give such testimony or make such deposition or certificate.

A witness who testifies falsely as to a material fact is guilty of perjury, though he were not a competent witness. (*Chamberlain v. People*, 23 N. Y., 85.)

§ 99. **Witness' knowledge of materiality of his testimony not necessary.**—It is no defense to a prosecution for

perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have affected such proceeding.

New.

(a) **Materiality of oath.**—The false oath must be material to the issue. (*Pendergrast's case*, 3 C. H. Rec., 11; *Geston v. People*, 4 Lans., 487; 61 Barb., 85; *Rouse v. Ross*, 1 Wend., 475; *Wood v. People*, 59 N. Y., 117.)

(b) **Want of knowledge.**—A person may commit perjury by testifying to what is true in fact, though he did not know whether it was true or false. (*People v. McKinney*, 3 Park., 510.)

(c) **Materiality inferred.**—The materiality of false evidence must be inferred from all the circumstances of the case. (*Johnson's case*, 1 C. H. Rec., 1; *Wood v. People*, 59 N. Y., 117.)

§ 100. **Making of deposition, etc., when deemed complete.**—The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the defendant to any other person with intent that it be uttered or published as true.

New. (See *People v. O'Reilly*, 61 How., 3; reversed in 24 Alb. L. J., 812.)

§ 101. **Statement of that which one does not know to be true.**—An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

New. A person may commit perjury by testifying to something true in fact, though he did not know whether or not it was true. (*People v. McKinney*, 3 Park., 510; *Com. v. Cornish*, 6 Benn., 249.)

One who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as though he knew it to be untrue. (*Bennett v. Judson*, 21 N. Y., 238; *Stemman v. McWilliams*, 6 Penn. St., 170.)

§ 102. **Summary committal of witnesses who have committed perjury.**—Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding in that court, has committed perjury in any testimony so given, the court may immediately commit him, by an order or process for that purpose, to prison, or take a recognizance, with sureties, for his appearing and answering to an indictment for perjury.

3 R. S., 956; § 5; 2 R. S. (Edm.), 702, § 5; 1 R. L., 173, § 3.

§ 103. **Witnesses necessary to prove the perjury may be bound over to appear.** — In a case specified in the last section, the court may bind over witnesses to establish the perjury, to appear at the proper court to testify before a grand jury, and also upon the trial, in case an indictment is found for the perjury. It must cause immediate notice of any such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.

3 R. S., 956, § 6; 2 R. S. (Edm.), 702, § 6.

§ 104. **Documents necessary to prove such perjury may be detained.** — In such a case, if a paper or document, produced by either party, is deemed by the court necessary to be used in the prosecution for the perjury, the court may detain the same, and direct it to be delivered to the district attorney.

3 R. S., 956, § 7; 2 R. S. (Edm.), 702, § 7.

§ 105. **Subornation of perjury defined.** — A person, who willfully procures or induces another to commit perjury, is guilty of subornation of perjury.

3 R. S., 956, § 8; 2 R. S. (Edm.), 702, §§ 8, 8.

An offense at common law. (2 Whar. Crim. Law, § 1829; also *Com. v. Douglas*, 5 Met. [Mass.], 241; *Stewart v. State*, 22 Ohio, 477.)

(a) **When action will not lie.** — No action will lie against a person in this state for suborning a witness to swear falsely in a cause in another state. (*Smith v. Lewis*, 3 Johns., 157.)

(b) **Single witness.** — On a trial for subornation of perjury the jury cannot convict on the uncorroborated testimony of a single witness. (*People v. Evans*, 40 N. Y., 1.)

(c) **Inciting or soliciting another.** — It was held that under the Revised Statutes declaring every person guilty of a felony who shall, by the offer of any valuable consideration, attempt unlawfully and corruptly to procure any other to commit willful and corrupt perjury, it is not essential to the validity of the indictment for the offense that it should aver that the accused incited or solicited the other to commit perjury. (*Stratton v. People*, 81 N. Y., 629.)

(d) **Attorney procuring false deposition.** — Where an attorney, for the purpose of procuring depositions of several witnesses, sent money beforehand to them in considerable sums, together with answers to the interrogatories annexed to the commission, and it turned out that such depositions were wholly false, though it did not appear clearly that said attorney knew they were false: *Held*, that though the facts were insufficient to constitute subornation of perjury, the conduct of the attorney was entirely improper, reprehensible and deserved the severe censure of the court. (*In re Eldridge*, 9 N. Y. Week. Dig., 6.)

§ 106. **Punishment of perjury and subornation.**— Perjury and subornation of perjury are each punishable as follows:

1. When the perjury is committed upon the trial of an indictment for felony, by imprisonment for not less than five nor more than twenty years.

2. In any other case, by imprisonment for not less than two nor more than ten years.

3 R. S., 956, § 2; 2 R. S. (Edm.), 701, 702, §§ 2, 4, 8; see cases cited under last section.

CHAPTER VI.

FALSIFYING EVIDENCE.

SECTION 107. Offering false evidence.

108. Deceiving a witness.

109. Preparing false evidence.

110. Destroying evidence.

111. Preventing or dissuading witnesses from attending.

112. Inducing another to commit perjury.

113. Bribing witnesses.

§ 107. **Offering false evidence.**— A person who, upon any trial, hearing, inquiry, investigation, or other proceeding authorized by law, offers or procures to be offered in evidence, as genuine, a book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered, is guilty of felony.

New.

§ 108. **Deceiving a witness.**— A person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever, conducted by authority of law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

New. Where an attorney prepared a deposition without knowing whether its statements are true or false, and sends it, together with a sum of money, to a person, requesting him to swear to it, held very improper and reprehensible. (*In re Eldridge*, 9 N. Y. Week. Dig., 6.)

§ 109. **Preparing false evidence.**— A person who fraudulently makes or prepares any false record, instrument in writing,

or other matter or thing, with intent to produce it, or allow it to be produced in evidence, as genuine, upon any trial, hearing, investigation, inquiry, or other proceeding, authorized by law, is guilty of a felony.

New. (See cases referred to under last section.)

§ 110. **Destroying evidence.**— A person who, knowing that a book, paper, record, instrument in writing, or other matter or thing, is or may be required in evidence upon any trial, hearing, inquiry, investigation, or other proceeding, authorized by law, willfully destroys the same, with intent thereby to prevent the same from being produced, is guilty of a misdemeanor.

New.

§ 111. **Preventing or dissuading witnesses from attending.**— A person who willfully prevents or dissuades any person who has been duly summoned or subpoenaed as a witness from attending, pursuant to the summons or subpoena, is guilty of a misdemeanor.

New.

§ 112. **Inducing another to commit perjury.**— A person who without giving, offering or promising a bribe, incites or attempts to procure another to commit perjury, or to give false testimony as a witness, though no perjury is committed or false testimony given, or to withhold true testimony, is guilty of a misdemeanor.

New in form. (3 R. S. [Edm.], 702, §§ 3, 8; see *In re Eldridge*, cited under section 108, *ante*, and cases cited under section 105, *ante*.)

An indictment of subornation for perjury averred that the prisoner, by the offer of a sum of money, attempted unlawfully and corruptly to procure another to commit willful and corrupt perjury, held sufficient. (*Stratton v. People*, 81 N. Y., 629; 10 N. Y. Week. Dig., 260; 20 Hun, 288.)

§ 113. **Bribing witnesses.**— A person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony or to withhold true testimony, is guilty of a felony.

3 R. S., 958, § 8; 2 R. S. (Edm.), 702, §§ 3, 8; see § 80, *ante*.

A civil action will not lie for suborning a witness to swear falsely in a case to be tried in another state. (*Smith v. Lewis*, 3 Johns., 157.)

CHAPTER VII.

OTHER OFFENSES AGAINST PUBLIC JUSTICE.

- SECTION 114. Injury to record and misappropriation by ministerial officers.
115. Permitting escapes, and other unlawful acts, committed by ministerial officers.
116. Neglecting or refusing to execute process.
117. General provision as to neglect, etc.
118. Delaying to take person arrested for crime before a magistrate.
119. Making arrests, etc., without lawful authority.
120. Misconduct in executing search warrant.
121. Refusal to aid officer in making an arrest.
122. Refusing to make an arrest.
123. Resisting execution of process, aiding escapes, etc., in county which has been proclaimed in insurrection.
124. Resisting public officer in the discharge of his duty.
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163. Other false certificates.
164. Penalty for recording, etc., without acknowledgment.
165. False auditing and paying claims.
166. False auditing and paying claims.
167. False auditing and paying claims.

§ 114. Injury to records and misappropriation by ministerial officers. — A sheriff, coroner, clerk of a court, constable or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either

1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office ; or,
2. Fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office, is guilty of felony.

2 R. S. (Edm.), 700, §§ 69, 70; see §§ 58, 94, *ante*, and §§ 470, 472, *post*; *Ayres v. Covill*, 18 Barb., 263.

§ 115. Permitting escapes, and other unlawful acts, committed by ministerial officers. — A sheriff, coroner, clerk of a court, constable or other ministerial officer and every deputy or subordinate of any ministerial officer, who either

1. Receives any gratuity or reward, or any security or promise of one, to procure, assist, connive at, or permit any prisoner in his custody to escape, whether such escape is attempted or not ; or,
2. Commits any unlawful act tending to hinder justice, is guilty of misdemeanor.

3 R. S., 961, § 30; 2 R. S. (Edm.), 706, § 18; 2 Wharton's Crim. Law, § 1668; 1 Hale, 600; *Blue v. Ccm.*, 4 Watts, 215; *Shattuck v. State*, 51 Miss , 575; see §§ 58, 89, 90, *ante*.

§ 116. Neglecting or refusing to execute process. — An officer who, in violation of a duty imposed upon him by law to receive a person into his official custody, or into a prison under

his charge, willfully neglects or refuses so to do, is guilty of a misdemeanor.

3 R. S., 961, § 30; 2 R. S. (Edm.), 571, § 3; see, also, § 154, *post*.

An action will not lie against a constable for not serving an original execution after it has been renewed by the plaintiff. (*Homan v. Liswell*, 6 Cow., 659.)

A sheriff upon whom a fine has been imposed for willful neglect of duty in regard to an execution, has no authority to enforce the execution for his own indemnity. (*Carpenter v. Stilwell*, 11 N. Y., 61.)

§ 117. General provision as to neglect, etc.—A public officer, or person holding a public trust or employment, upon whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor. This and the preceding section do not apply to cases of official acts or omissions, the prevention or punishment of which is otherwise specially provided by statute.

3 R. S., 983, § 101; 2 R. S. (Edm.), 719, § 38; see §§ 154, 471, 684, *post*.

(a) **Town clerk or justice of the peace.**—A town clerk or justice of the peace in neglecting to account according to law, is a breach of the statute. (*People v. Martin*, 43 How., 54.)

(b) **Officer must administer oath when requested.**—The officers before whom oaths and affidavits may be taken are bound to administer them when requested, and a refusal to do so subjects them to indictment for misdemeanor. (*People v. Brooks*, 1 Den., 457.)

(c) **Willful refusal.**—To render the neglect willful it is only necessary to show that it was intentional. (*Id.*)

(d) **Municipal officer.**—An officer of a municipal corporation is a public officer within the statute. (*People v. Bedell*, 2 Hill, 196.)

(e) **Inspectors or clerks of election.**—The neglect of the inspectors or clerks of an election, if willful, would subject them to indictment. (*People v. Cook*, 8 N. Y., 84.)

(f) **Refusing licenses.**—Justices, in granting or refusing licenses under the excise law, are liable to indictment for willful disregard of duty. (*People v. Norton*, 7 Barb., 477; see, also, *Clark v. Miller*, 47 id., 38.)

§ 118. Delaying to take person arrested for crime before a magistrate.—A public officer or other person having arrested any person upon a criminal charge, who willfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

New. (See Code Crim. Proc., § 165; and § 556, *post*.)

§ 119. (Amended 1882.) Making arrests, etc., without lawful authority.—A public officer, or person pretending to be a

public officer, who knowingly, under the pretense or color of any process, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements without a regular process therefor, is guilty of a misdemeanor.

§ R. S., 971, § 11; 2 R. S. (Edm.), 714, § 11; see § 556, *post*; Code Crim. Proc., § 183.

(a) **Showing process.** — It seems that a regular officer making an arrest within his proper district is not bound to show his process (*Bellows v. Shannon*, 2 Hill, 86); he should, however, make known form that he comes in his official character. (*Id.*)

(b) **Arrest by private person.** — An arrest by a private person is excused only where a felony has in fact been committed and there is reasonable ground to suspect the person arrested of its commission. (*Burns v. Erben*, 40 N. Y., 463; 1 Rob., 555; see, also, *Phillips v. Trull*, 11 Johns., 486.)

(c) **Arrest without warrant.** — An arrest cannot lawfully be made for a misdemeanor without a warrant. (*Sleight v. Ogle*, 4 E. D. Smith, 445.)

(d) **Constable may arrest without warrant.** — A constable has a right to arrest for a breach of the peace, on his own view, without a warrant. (*Taylor v. Strong*, 3 Wend., 384.)

(e) **Prima facie evidence of crime.** — An officer is justifiable in making an arrest without warrant, where there is *prima facie* ground for suspecting a felony has been committed. (*People v. Wolven*, 7 N. Y. Leg. Obs., 89; *Burns v. Erben*, 40 N. Y., 463.)

(f) **Peace officer.** — A peace officer can only arrest without warrant for a breach of the peace committed in his presence. (*Boyleston v. Kerr*, 2 Daly, 220.)

(g) **Breaking doors.** — An officer without a warrant has no right to break open an outer door in order to make an arrest. (*Randall's case*, 5 C. H. Rec., 141.)

§ 120. **Misconduct in executing search warrant.** — An officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

See 2 R. S. (Edm.), 771, §§ 25-27; see, also, §§ 159, 556, *post*.

(a) **Breaking doors.** — An officer may, in executing a search warrant made out in proper form, on demand of entrance and refusal, break down the outer or other door of a house. (*Bell v. Clapp*, 10 Johns., 263.)

Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued or regularly executed. (*Beatty v. Perkins*, 6 Wend., 382.)

Otherwise if he is actuated by malicious motives. (*Id.*)

§ 121. **Refusing to aid officer in making an arrest.** — A person who, after having been lawfully commanded to aid an

officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, is guilty of a misdemeanor.

2 R. S. (Edm.), 771, § 23.

§ 122. **Refusing to make an arrest.** — A person who, after having been lawfully commanded by any magistrate to arrest another person, willfully neglects or refuses so to do, is guilty of a misdemeanor.

2 R. S. (Edm.), 706, § 3; *Id.*, 571, § 3.

§ 123. (Amended 1882.) **Resisting execution of process, aiding escapes, etc., in county which has been proclaimed in insurrection.** — A person, who, after proclamation issued by the governor declaring a county to be in a state of insurrection, resists, or aids in resisting, the execution of process in such county, or who aids or attempts the rescue or escape of another from lawful custody or confinement in such county, or who resists, or aids in resisting a force ordered out by the governor to quell or suppress an insurrection, is guilty of a felony.

2 R. S. (Edm.), 460, §§ 80, 81.

(a) **Aiding officer.** — A person acting in aid of an officer, and by his commandment in overcoming resistance to the execution of a process, is a trespasser if the officer is not justified by the process. (*Elder v. Morrison*, 10 Wend., 128.)

(b) **Bystanders obey at their peril.** — The bystander obeys at his peril; if the officer has the authority to do the act for which aid is required, the bystander is bound to obey and is justified; and if he refuses or neglects, is guilty of a misdemeanor. (*Id.*)

§ 124. **Resisting public officer in the discharge of his duty.** — A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging, or attempting to discharge, a duty of his office, is guilty of a misdemeanor.

2 R. S. (Edm.), 460, § 81; see § 47, *ante*.

§ 125. **Compounding crimes.** — A person who takes money or other property, gratuity or reward, or an engagement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal a crime, or a violation of statute, or to abstain from, discontinue or delay, a prosecution

therefor, or to withhold any evidence thereof, except in a case where a compromise is allowed by law, is guilty

1. Of a felony, punishable by imprisonment in a state prison for not more than five years, where the agreement or understanding relates to a felony punishable by death, or by imprisonment in a state prison for life;

2. Of a felony, punishable by imprisonment in a state prison for not more than three years, where the agreement or understanding relates to another felony;

3. Of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, or by fine of not more than two hundred and fifty dollars, or both, where the agreement or understanding relates to a misdemeanor, or to a violation of a statute for which a pecuniary penalty or forfeiture is prescribed.

3 R. S., 966, § 22; Id., 971, § 12; 2 R. S. (Edm.), 711, § 17; see Code of Crim. Proc., §§ 664, 665, 666.

(a) **After conviction.** — Assault and battery cannot be compromised after conviction. (*People v. Bishop*, 5 Wend., 111.)

(b) **Discontinuing and paying costs.** — The discontinuance and payment of costs is not a compounding of a popular action. (*Haskins v. Newcomb*, 2 Johns., 405.)

(c) **Note invalid.** — A note given to compound a felony is invalid. (*Conderman v. Hicks*, 3 Lans., 108.)

(d) **Express agreement.** — It is unnecessary to prove an express agreement to compound the crime, in order to render the note invalid. (Id.; *Conderman v. Trenchard*, 58 Barb., 165.)

(e) **What a bar to indictment.** — A party indicted for compounding a larceny cannot plead the acquittal of the person charged with larceny as a bar to his own conviction. (*People v. Buckland*, 13 Wend., 592.)

(f) **Money cannot be recovered back.** — Money paid in settlement of a felony cannot be recovered back. (*Daimouth v. Bennett*, 15 Barb., 541.)

(g) **Contract to drop prosecution is illegal.** — A contract to drop a prosecution for a felony is immoral and illegal; and if money is paid thereon by a third person he is "*particeps criminis*." (Id.)

(h) **Consent of court.** — A misdemeanor cannot be compounded by the parties, except by the consent of the court and approbation of the district attorney. (*Gilmore's case*, 2 C. H. Rec., 29; *Collins' case*, 4 id., 139.)

(i) **Payment of forged paper.** — It is not a compounding of a felony for the holder of forged paper to accept payment of the same and surrender it up, although he knows it to be forged, no proceedings having been taken against the forger. (*Kissock v. House*, 23 Hun, 85, 86.)

§ 126. **Conviction of primary offender, etc.** — Upon the trial of an indictment for compounding a crime, it is not neces-

sary to prove that any person has been convicted of the crime or violation of statute, in relation to which an agreement or understanding herein prohibited was made.

3 R. S., 966, § 24; 2 R. S. (Edm.), 711, § 19; see § 82, *ante*.

In the case of an indictment for compounding a crime and agreeing to withhold evidence, the acquittal of the principal offender would not be competent evidence in defense. (*People v. Buckland*, 13 Wend., 598.)

§ 127. **Intimidating, etc., public officer.** — A person who directly or indirectly addresses any threat or intimidation to a public officer, or to a juror, referee, arbitrator, appraiser or assessor, or to any other person authorized by law to hear or determine any controversy or matter, with intent to induce him contrary to his duty, to do or make, or to omit or delay any act, decision or determination, is guilty of a misdemeanor.

New. (See §§ 61, 62, 63, *ante*, and § 464, *post*.)

§ 128. **Suppressing evidence.** — A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper or other thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper or other thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor.

New. (See §§ 110, 111, *ante*; 2 R. S. [Edm.], 711, § 17; *Id.*, 714, § 12.)

§ 129. **Buying lands in suit.** — A person who takes a conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in the possession thereof, while such lands or tenements are the subject of controversy, by suit in any court, knowing the pendency of such suit, and that the grantor was not in possession of such lands or tenements, is guilty of a misdemeanor.

3 R. S., 970, § 5; 2 R. S. (Edm.), 713, § 5.

(a) **Champerty.** — The purchase of land pending a suit concerning it is champerty, and the conveyance void, though made in good faith. (*Hendricks v. Andrews*, 7 Wend., 152; *Bryant v. Ketchum*, 8 Johns., 479.)

One who knowingly makes a purchase of land in the adverse possession of a third party claiming by deed, is liable to a penalty under the statute. (*Teels v. Honda*, 7 Johns., 251.)

(b) **Penalty.** — The penalty under old statute was the value of the property purchased. (*Tomb v. Sherwood*, 13 id., 289.)

(c) **Knowledge.** — To render purchaser liable to the statute he must have knowledge that possession was adverse. (*Preston v. Hunt*, 7 Wend., 53; *Clouse v. Hawley*, 12 Johns., 484; *Hassenfrats v. Kelly*, 13 id., 406; *Etheridge v. Cromwell*, 8 Wend., 629.)

(d) **Adverse possession.** — Where one purchases land held adversely, he is liable to the statute whether his grantor's title is good or bad. (*Tomb v. Sherwood*, 13 Johns., 288.)

(e) **Deed as security.** — A party holding by absolute deed, the same being only as security for money, and not being in possession, is liable if he sells the property. (*Lane v. Shears*, 1 Wend., 433.)

(f) **Selling right and title.** — A party who simply sells his right and title to land under advice of counsel, not liable. (*Van Dyck v. Van Buren*, 1 Johns., 345.)

(g) **Sale of an easement.** — Sale of land subject to an easement not within the statute. (*Witter v. Blodget*, 4 N. Y. Leg. Obs., 263; *Sedgwick v. Stanton*, 14 N. Y., 289; 18 Barb., 478.)

(h) **Judicial sales.** — The statute does not apply to judicial sales. (*Tuttle v. Jackson*, 6 Wend., 213; *Truax v. Thorn*, 2 Barb., 156; see, also, *Webb v. Bendon*, 21 Wend., 98.)

(i) **Act of 1862.** — Since the passage of the act of 1862, enabling the grantees of land held adversely to bring actions in the name of their grantor, the taking of such a conveyance has ceased to be a misdemeanor. (*Towle v. Smith*, 2 Rob., 489.)

(j) **What will avoid a deed.** — To avoid a deed on the ground of adverse possession in another, such adverse possession must be clearly and positively shown. (*Wickham v. Conklin*, 8 Johns., 220.)

(k) **Maintenance.** — Maintenance is no longer an offense, except as to buying and selling pretended titles to land. (*Mott v. Small*, 20 Wend., 212; 23 id., 403; *Voorhees v. Dorr*, 51 Barb., 580.)

(l) **Covenant to convey.** — A covenant to convey to a relation by affinity one-fourth of certain premises, for which ejectment is to be brought, in consideration of the latter's paying half the expenses of the litigation, is not against the statute. (*Thallimer v. Brinckerhoff*, 3 Cow., 623.)

(m) **Actual possession.** — Under the statute, in order to make a transfer void the party claiming adversely must be in actual possession under some specific title. (*Fish v. Fish*, 39 Barb., 513.)

(n) **Land by inheritance.** — One whose wife may inherit land from a claimant out of possession may lawfully maintain the suit of such claimant for such lands, under an agreement to have the whole avails of the recovery. (*Gilliland v. Failing*, 5 Den., 808.)

(o) **Actual and constructive adverse possession.** — To avoid a deed for champerty under the statute, actual, and not constructive, adverse possession in another is required. (*Dawley v. Brown*, 79 N. Y., 390.)

(p) **Disputed boundaries.** — The statute of champerty is not applicable to cases of disputed boundary lines. (*Allen v. Welch*, 18 Hun, 226.)

§ 130. **Buying pretended titles.** — A person who buys or sells, or in any manner procures, or takes or makes any covenant or promise to convey any right or title, real or pretended, to any lands or tenements, unless the grantor thereof or the person making such covenant or promise has been in possession, or he and those by whom he claims, have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such covenant or promise made, is guilty of a misdemeanor.

3 R. S., 970, § 6; 2 R. S. (Edm.), 718, § 6.

(a) **Maintenance.** — Maintenance is no longer an offense, except as to buying and selling pretended titles to land. (*Mott v. Small*, 20 Wend., 212; 22 id., 408; *Voorhees v. Dorr*, 51 Barb., 580; *Tuttle v. Jackson*, 6 Wend., 218.)

(b) **Actual possession.** — To bring a case within the statute, the possession must be actual and not simply constructive. (*Dawley v. Brown*, 79 N. Y., 890.)

(c) **Sales by decree.** — The statute does not apply to sales by decree of competent court. (*Tuttle v. Jackson*, 6 Wend., 218; *Truax v. Truax*, 2 Barb., 156; *Webb v. Bendon*, 21 Wend., 98; *Thallimer v. Brinckerhoff*, 3 Cow., 623; *Gilliland v. Failing*, 5 Den., 808; *Tomb v. Sherwood*, 13 Johns., 289; *Pepper v. Haight*, 20 Barb., 429; *Allen v. Welch*, 18 Hun, 226; *Ten Eyck v. Craig*, 5 T. & C., 70; see, also, cases cited at length under last section.)

§ 131. **Mortgage of lands under adverse possession not prohibited.** — The last two sections shall not be construed to prevent any person having a just title to lands, in the adverse possession of another, from executing a mortgage upon such lands.

3 R. S., 970, § 7; 2 R. S. (Edm.), 714, § 7.

§ 132. **Common barratry defined.** — Common barratry is the practice of exciting groundless judicial proceedings.

New. (4 Black. Com., 134, 135; *Com. v. Davis*, 11 Pick., 432; *Com. v. McCulloch*, 15 Mass., 227; *Com. v. Tubbs*, 1 Cush. [Mass.], 2; 8 Coke, 36; 2 Wharton's Crim. Law, § 1444; *Com. v. Mohn*, 52 Penn. St., 243.)

A single instance does not constitute the offense of barratry: that offense consists in the practice or habit of stirring up strife. (*Voorhees v. Dorr*, 51 Barb., 580, 581.)

§ 133. **Declared a misdemeanor.** — Common barratry is a misdemeanor.

New.

§ 134. **What proof is required.** — No person can be convicted of common barratry, except upon proof that he has excited

actions or legal proceedings, in at least three instances, and with a corrupt or malicious intent to vex and annoy.

New.

A single instance not barratry. (*Voorhees v. Dorr*, 51 Barb., 580, 581.)

§ 135. **Interest.** — Upon a prosecution for common barratry, the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of, is not a defense.

New.

§ 136. **Buying demands for suit by an attorney.** — An attorney or counselor who violates section seventy-three of the Code of Civil Procedure, relating to buying demands, or section seventy-four of the Code of Civil Procedure relating to certain promises and gifts, is guilty of a misdemeanor.

3 R. S., 449, §§ 59, 60, 61, 62; 2 R. S. (Edm.), 297, §§ 71, 72, 73, 74, 75; Code Civil Proc., § 73.

(a) **Evidence of intent.** — The mere purchase does not warrant a conclusion as to the intent. (*Williams v. Matthews*, 3 Cow., 252.)

(b) **Advances made.** — Advances made by an attorney to a client made long after the commencement of suit, and from motives of humanity, are not within statute. (*Bristol v. Dunn*, 12 Wend., 142.)

(c) **Illegal intent must be proved.** — Illegal intent must be proved. Mere purchase of a chose in action not sufficient. The statute extends to suits in equity; but foreclosure by advertisement is not a suit. (*Hall v. Bartlett*, 9 Barb., 297; *Mann v. Fairchild*, 2 Keyes, 106; 14 Barb., 548; *Baldwin v. Latson*, 2 Barb. Ch., 806; *Warren v. Helmer*, 8 How., 419; see, also, *Hall v. Gird*, 7 Hill, 586.)

(d) **May protect his rights.** — The statute was not intended to prevent a purchase for an honest purpose of protecting some other important right of the assignee. (*Baldwin v. Latson*, 2 Barb. Ch., 806.)

(e) **May buy judgment.** — The statute does not forbid the buying a judgment for the purpose of collecting it by execution. (*Warner v. Paine*, 3 Barb. Ch., 630; *Brotherson v. Consalus*, 26 How., 213.)

(f) **Buying stock.** — Buying stock and bringing suit as a stockholder not within the statute. (*Ramsey v. E. R. R. Co.*, 8 Abb. [N. S.], 174.)

(g) Does not apply to justices' courts. (*Goodell v. People*, 5 Park. Cr., 206.)

(h) **Contingent purpose.** — Buying with intent to sue, even in a certain contingency, violates the statute. (*Moses v. McDavitt*, 2 Abb. N. C., 47.)

(i) **Judicial sales.** — The statute covers purchases made at judicial sales, made under direction of an officer of court. (*Mann v. Fairchild*, 2 Keyes, 106; 14 Barb., 548; *Hall v. Gird*, 7 Hill, 586; *Arden v. Patterson*, 5 Johns. Ch., 44; *Barry v. Whitney*, 3 Sandf., 696; *Voorhees v. Dorr*, 51 Barb., 587; *Ramsey v. Gould*, 57 id., 896.)

(j) **Junior creditors.** — An attorney who is a junior judgment creditor may purchase a prior judgment for his own protection. (*Van Rensselaer v. Sheriff of Onondaga*, 1 Cow., 443.)

(k) **Attorney cannot advance money.** — An attorney may stipulate with his client for an agreed compensation, and may make it absolute or contingent, but he cannot agree to advance the money needed to carry on the prosecution as an inducement for the placing the claim in his hands. (*Coughlin v. N. Y. C. R. R. Co.*, 71 N. Y., 433; reversing 8 Hun, 136.)

§ 137. **Buying demands by a justice or constable, for suit before a justice.** — A justice of the peace or a constable who, directly or indirectly, buys or is interested in buying, anything in action, for the purpose of commencing a suit thereon before a justice, is guilty of a misdemeanor.

3 R. S., 427, §§ 164, 165; 2 R. S. (Edm.), 275, § 236; Code Civ. Proc., §§ 3137, 3138.

Though it seems the statute does not apply to claims sued in justices' court. (*Goodell v. People*, 5 Park. Cr., 206; *Warren v. Helmer*, 8 How. Pr., 420; see opinion of judge.)

§ 138. (Amended 1882.) **Lending money upon claims delivered for collection.** — A justice of the peace or constable who, directly or indirectly, gives, or promises to give, any valuable consideration to any person as an inducement to bring, or in consideration of having brought, a suit thereon before a justice, is guilty of a misdemeanor.

3 R. S., 427, §§ 164, 165; 2 R. S. (Edm.), 275, §§ 235, 236; Code Civ. Proc., §§ 3137, 3138.

§ 139. **Forfeiture of office.** — A person convicted of a violation of any of the three preceding sections, in addition to the punishment, by fine and imprisonment, prescribed therefor by this Code, forfeits his office.

3 R. S., 427, § 165; Id., 449, § 61; 2 R. S. (Edm.) 276, § 236; Code Civ. Proc., § 3138.

§ 140. **Receiving claims, in what cases allowable.** — Nothing in the four preceding sections shall be construed to prohibit the receiving in payment of anything in action for any estate, real or personal, or for any services of an attorney or counselor actually rendered, or for a debt antecedently contracted; or the buying or receiving of anything in action for the purpose of remittance, and without any intent to violate the preceding sections.

3 R. S., 449, § 62; 2 R. S. (Edm.), 276, § 74; Code Civ. Proc., § 76.

(a) **When attorney may purchase a claim.** — The purchasing of a note by a practicing attorney not unlawful where he is a creditor of the holder, and the purchase is made for the purpose of securing a debt, without intent to evade the statute. (*Watson v. McLaren*, 19 Wend., 557; *Baldwin v. Latson*, 2 Barb. Ch., 806; see *Mann v. Fairchild*, 2 Keyes, 106.)

(b) **May purchase mortgage.** — Does not prohibit purchase of a mortgage by an attorney, and a foreclosure by advertisement and sale. (*Hall v. Bartlett*, 9 Barb., 297.)

(c) **May take a note or claim in payment of services.** — Attorneys and counselors-at-law are prohibited from the receiving of any promissory note, etc., except in payment for real estate or personal sold, for services rendered, for a debt antecedently contracted, or for the purpose of making a remittance, although such note, etc., be not purchased for collection, or for the purpose of bringing a suit thereon. (*People v. Walbridge*, 3 Wend., 120; see, also, *Gerdoll v. People*, 5 Park., 206.)

(d) **May purchase corporate stock.** — The purchase of the stock of a corporation by an attorney is not a violation of the statutes, it not being one of the securities mentioned. (*Ramsey v. Gould*, 57 Barb., 398.)

(e) **Penal statute.** — The statute is a penal one, and cannot be extended to that not expressly included. (*Id.*)

§ 141. (Amended 1882.) **Application of previous sections to persons prosecuting in person.** — The provisions of sections one hundred and thirty-six, one hundred and thirty-eight and one hundred and forty, relative to the buying of claims by an attorney, counselor, justice of the peace or constable, with intent to prosecute them, or to the lending or advancing of money by an attorney or counselor, in consideration of a claim being delivered for collection, apply to every case of such buying a claim, or lending or advancing money, by any person prosecuting in person an action or legal proceeding.

3 R. S., 449, §§ 59, 60, 61, 62; 2 R. S. (Edm.), 590, § 47; Laws 1847, ch. 370; Code Civ. Proc., 77.

§ 142. **Witness' privilege restricted.** — No person shall be excused from testifying, in any civil action or legal proceeding, to any facts showing that a thing in action has been bought, sold or received contrary to law, upon the ground that his testimony might tend to convict him of a crime. But no evidence derived from the examination of such person shall be received against him upon a criminal prosecution.

3 R. S., 450, §§ 64, 70; *Id.*, 427, §§ 166-171; 2 R. S. (Edm.), 423, § 71; see § 712, *post*; see Code Civ. Proc., § 2560.

§ 143. **Criminal contempts.** — A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor :

1. Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority ;

2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in the presence of a jury, while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law ;

3. Breach of the peace, noise or other disturbance, directly tending to interrupt the proceedings of a court, jury or referee ;

4. Willful disobedience to the lawful process or other mandate of a court ;

5. Resistance willfully offered to its lawful process or other mandate ;

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory ;

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full and fair report of a trial, argument, decision or other proceeding had in court.

3 R. S., 441, § 9; Id., 971, § 14; 2 R. S. (Edm.), 288, §§ 10, 11; Id., 715, § 14; Code Civ. Proc., §§ 8-14.

(a) **Court of special sessions.**—A person who being duly summoned as a witness in a court of special sessions is guilty of contempt. (*Bowen v. Hunter*, 45 How., 193.)

(b) **Before a grand jury.**—Where a witness summoned before a grand jury declined to answer, and after the court had ruled on the question repeated his refusal, it was held to be a contempt in the presence of the court. (*Muttler of Hackley*, 24 N. Y., 74; 12 Abb., 150; 21 How., 54; *People v. Court of O. and T.*, 27 id., 14.)

A witness before a grand jury may be committed till he answers. (*People v. Funcher*, 2 Hun, 226.)

(c) **Bribing juror.**—Party attempting to bribe a juror punished by thirty days' imprisonment and fine of \$250. (*Klugman's case*, 49 How., 484.)

(d) **Willful disobedience.**—If the disobedience be willful, whether it occasion loss to the party or not, it is criminal. (*People v. Compton*, 1 Duer, 512; 9 N. Y., 263.)

(e) **Criminal and civil contempt.**—In criminal contempt, as distinguished from those to enforce civil remedies, it is the satisfaction of the wounded dignity of the law, and the respect due to the tribunals of justice, that is sought. (*Conover v. Wood*, 5 Abb., 84.)

(f) **Should be clearly proven.**—The power of the court to punish as for a criminal contempt should not be exercised unless the acts constituting it are clearly proven. (*Weeks v. Smith*, 8 Abb., 211.)

(g) **Favorable construction.**—If the order disobeyed be capable of a construction favorable to the innocence of a party, punishment will not be ordered. (*Id.*)

(h) **Not appearing as witness.**—To punish a party for contempt in not appearing as a witness, a copy of the order requiring him to do so must have been personally served on him. (*Loop v. Gould*, 17 Hun, 585; *In re Percy*, 2 Daly, 539.)

(i) **Tampering with grand jury.**—To constitute a communication to the grand jury a contempt, the manner of making it must involve some contemptuous behavior, committed during the sitting of the court, tending to impair the respect due it. (*Bergh's case*, 16 Abb. Pr. [N. S.], 266.)

(j) **Erasing verification of legal papers.**—It is a criminal contempt for an attorney to erase a portion of a verification of an answer served on him, and then to return it as insufficient. (*Bernard v. Leo*, 7 Da. Reg., 1069, 1213.)

(k) **Fine and counsel fee.**—The court cannot include in a fine imposed on a party for contempt a counsel fee to the opposite party. (*Ex parte Jacobs*, 49 How., 370; 5 Hun, 428; 66 N. Y., 8.)

(l) **Costs.**—What costs may be allowed in proceedings for contempt. (*Van Valkenburgh v. Doolittle*, 4 Abb. N. C., 72.)

§ 144. **Grand juror acting after challenge has been allowed.**—A grand juror who, with knowledge that a challenge interposed against him by a defendant, has been allowed, is present at, or takes part, or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

New. (Code Crim. Proc., §§ 242, 243.)

§ 145. **Disclosure of depositions taken by a magistrate.** A magistrate or clerk of any magistrate who willfully permits any deposition taken on an examination of a defendant before such magistrate, and remaining in the custody of such magistrate or clerk, to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney-general, the district attorney of the county and his assistants, and the defendant and his counsel, is guilty of a misdemeanor.

§ 146. **Disclosure of depositions returned by grand jury with presentment.**—A clerk of any court who willfully permits any deposition returned by a grand jury and filed with such clerk, to be inspected by any person, except the court, the deputies or assistants of such clerk, and the district attorney and his assistants, until after the arrest of the defendant, is guilty of a misdemeanor.

New in form. (Code Crim. Proc., § 206.)

§ 147. **Racing near a court.**—A person concerned in any racing, running or other trial of speed between horses or other animals, within one mile of the place where a court is actually sitting, is guilty of a misdemeanor.

3 R. S., 971, § 13; 2 R. S. (Edm.), 715, § 13; 1 R. L., 223, § 6; Code Crim. Proc., § 57.

§ 148. **Misconduct by attorneys.**—An attorney or counselor who,

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party as prohibited by section seventy of the Code of Civil Procedure; or,

2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or become answerable for, as prohibited by section seventy-one of the Code of Civil Procedure,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by this Code, he forfeits to the party injured treble damages, to be recovered in a civil action.

3 R. S., 449, §§ 56, 57; 2 R. S. (Edm.), 298, §§ 68, 69; Code Civil Proc., §§ 70, 71; see §§ 136, 139, *ante*, and 670, 671, *post*.

(a) **Fraud of attorney privately.**—Private fraud by an attorney, but not as an attorney, is not offense against the statute. (*Nevens' case*, 5 C. H. Rec., 79.)

(b) **Releasing sureties.**—An attorney, pending an appeal, may not consent to a new trial, thereby releasing the sureties on the appeal bond. (*Quinn v. Lloyd*, 36 How., 378.)

(c) **Disbarring attorney.**—An attorney cannot be disbarred for a criminal offense not of an infamous nature. (*Stryker's case*, 1 Wheeler's Cr. Cases, 330.)

(d) **Attorney amenable to the court.**—A counselor is amenable to the court for his professional conduct, and may be suspended for malpractice. (*Nevens' case*, 1 Wheeler's Cr. Cases, 337.)

(e) **Malpractice.**—What is such malpractice as will justify the disbarring of an attorney. (*Ex parte Loew*, 5 Hun, 462; 50 How., 373.)

(f) **Procuring deceptive evidence.**—To aid in procuring deceptive evidence is such unprofessional conduct as will authorize the disbarring of an attorney. (*Ex parte Gale*, 19 Alb. L. J., 95.)

(g) **Remedy against an attorney.**—The remedy against an attorney for an act inconsistent with his relations to the court is by summary proceeding and not by a formal action. (*Foster v. Townshend*, 68 N. Y., 208; see, also, *Ex parte Fincke*, 6 Daly, 111; *Ex parte Haskin*, 18 Hun, 42.)

§ 149. **Permitting attorney's name to be used.**—If an attorney knowingly permits any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by the next section, such attorney, and every person who shall so use his name, is guilty of a misdemeanor.

3 R. S., 449, §§ 58, 61; 2 R. S. (Edm.), 298, § 70.

(a) **Subpœna.**—A "subpœna" to testify as a witness is a "process" within the meaning of the statute prohibiting any person not the general law partner of an attorney, or a clerk in his office, from serving out any process in the name of such attorney. (*York v. Peck*, 31 Barb., 350.)

§ 150. **In what cases lawful.**—Whenever an action or proceeding is authorized by law to be prosecuted or defended in the name of the people, or of any public officer, board of officers or municipal corporation, on behalf of another party, the attorney-general, or district attorney, or attorney of such public officer or board or corporation may permit any proceeding therein, to be taken in his name by an attorney to be chosen by the party in interest.

1 R. S., 549, § 27.

§ 151. **Production of pretended heir.**—A person who fraudulently produces an infant, falsely pretending it to have been born of a parent whose child is or would be entitled to inherit real property, or to receive a share of personal property, with intent to intercept the inheritance of such real property, or the distribution of such personal property, or to defraud any person out of the same, or any interest therein; or who, with intent fraudulently to obtain any property, falsely represents himself or another to be a person entitled to an interest or share in the estate of a deceased person, either as executor, administrator, husband, wife, heir, legatee, devisee, next

of kin, or relative of such deceased person, is punishable by imprisonment in a state prison for not more than ten years.

3 R. S., 948, § 56; 2 R. S., 696, § 52.

(a) **What constitutes the offense.**—What constitutes the offense of fraudulently producing an infant, falsely pretending it to have been born of parents whose child would be entitled to inherit property, as prohibited under statute. (*People v. Cunningham*, 3 Park., 520; reversed on other grounds in *Id.*, 531.)

§ 152. **Substituting one child for another.**—A person to whom a child has been confided for nursing, education, or any other purpose, who, with intent to deceive a parent, guardian or relative of the child, substitutes or produces to such parent, guardian or relative, another child or person, in place of the child so confided, is punishable by imprisonment in a state prison for not more than seven years.

3 R. S., 948, § 57; 2 R. S. (Edm.), 696, § 52.

§ 153. **Importing foreign convicts.**—An owner, master or commander of any vessel arriving from a foreign country, who knowingly lands or permits to land at any port, city, harbor, or place within this state, any passenger, seaman or other person who is a foreign convict of any crime which, if committed within this state, would be punishable therein, without giving notice thereof to the mayor of such city, or other principal municipal officer of such port or place, is guilty of a misdemeanor.

3 R. S., 978, § 67; Laws 1883, ch. 230, § 1; see § 440, *post*; Code Crim. Proc., § 674.

§ 154. **Omission of duty by public officer.**—Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

3 R. S., 983, § 101; 2 R. S. (Edm.), 719, § 88; see §§ 116, 117, *ante*, and § 684, *post*.

(a) **Illegal discharge.**—An indictment lies against a justice of the peace who, with the intent to prevent the course of law and justice, discharges an offender brought before him. (*People v. Coon*, 15 Den., 276.)

(b) **Misbehavior in office.**—Also for a misbehavior in office, when he acts from corrupt motives. (*Id.*)

(c) **Commissioners of excise.**—An indictment will lie against commissioners of excise for willfully and corruptly granting license to sell spirituous liquors. (*People v. Norton*, 7 Barb., 477.)

(d) **Officer must administer oath.**—An officer before whom an oath or affidavit may be taken is bound to administer the same when requested, and a refusal to do so is a misdemeanor. (*People v. Brooks*, 1 Den., 457.)

(e) **Judicial officer.**—An action will not lie for official misconduct in a judicial officer, if a statute declares his own record to be conclusive evidence in all courts of the facts therein contained. (*Ounningham v. Bucklin*, 8 Cow., 178.)

(f) **Justice refusing adjournment.**—If a justice refuse to grant an adjournment because defendant refuses to pay his fees for drawing a bond, he is guilty of a misdemeanor. (*People v. Calhoun*, 3 Wend., 431.)

(g) **Warrant of arrest.**—A magistrate not of the county where the offense was committed, may not issue a warrant for the arrest of the offender. (*Green v. Rumsey*, 2 Wend., 611.)

(h) **Election of inspectors.**—Fraud in the action of election inspectors. (*People v. Cook*, 8 N. Y., 87; *Gardner v. People*, 3 Hun, 223.)

(i) **Highway commissioners.**—Breach of duty on the part of highway commissioners. (*Clark v. Miller*, 47 Barb., 38; *Bartlett v. Crozier*, 17 Johns., 439.)

Neglect of duty on part of supervisors. (*People v. Martin*, 43 How., 52.)

(j) **Supervisor.**—If a supervisor wickedly abuses or fraudulently exceeds his powers, he is punishable by indictment. (*People v. Stocking*, 33 How., 49; 50 Barb., 578.)

(k) **Overseer of poor.**—Willful neglect by an overseer of the poor a misdemeanor. (*In re Pickett*, 55 How., 491; *Bently v. Phelps*, 27 Barb., 524.)

(l) **Superintendent of public works.**—Liability of the head of department of public buildings, city of New York, for neglect of duty. (*Connors v. Adams*, 18 Hun, 427.)

§ 155. Commission of prohibited acts.—Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor.

3 R. S., 983, § 102; 2 R. S. (Edm.), 719, § 39; see § 471 *post*.

(a) **Accounting of overseer.**—The law makes it the duty of an overseer of the poor to account for all moneys received and disbursed by him, but prescribes no penalty for the willful neglect of such duty. *Held*, that such willful neglect is a misdemeanor under the statute. (*Ex parte Pickett*, 55 How., 491.)

In such a case, the prosecution need not prove that the act was done with corrupt intent. (*People v. Bogart*, 3 Abb., 302; 3 Park., 143; see, also, *Foot v. People*, 56 N. Y., 321.)

§ 156. Disclosing fact of indictment having been found.
A judge, grand juror, district attorney, clerk, or other officer who,

except in the due discharge of his official duty, discloses, before an accused person is in custody, the fact of an indictment having been found or ordered against him, is guilty of a misdemeanor.

3 R. S., 1020, § 39; 2 R. S. (Edm.), 750, § 39.

§ 157. Grand juror disclosing what transpired before the grand jury.— A grand juror who, except when lawfully required by a court or officer, willfully discloses, either

1. Any evidence adduced before the grand jury; or
2. Anything which he himself or any other member of the grand jury said, or in what manner he or any other grand juror voted, upon any matter before them,

Is guilty of a misdemeanor.

3 R. S., 1019, § 31; 2 R. S. (Edm.), 748, § 31; Id., 750, § 39.

§ 158. Instituting suit in false name.— A person who institutes or prosecutes an action or other proceeding in the name of another without his consent and contrary to the statutes, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months.

3 R. S., 859, § 1; 2 R. S. (Edm.), 571, § 1; 1 R. L., 174, § 10; Code Civ. Proc., § 1900.

§ 159. Maliciously procuring search warrant.— A person who maliciously, and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

See U. S. Const., fourth amendment.

§ 160. Unauthorized communications with convict in state prison.— A person who, not being authorized by law, or by a written permission from an inspector, or by the consent of the warden, has any communication with a convict in a state prison, or brings into or conveys out of any state prison any letter or writing to or from a convict, is guilty of a misdemeanor.

Laws 1847, ch. 460, § 7; Code Crim. Proc., § 56.

§ 161. Neglect to return names of constables.— A town clerk who willfully omits to return to the county clerk the name of a person who has qualified as constable, pursuant to law, is punishable by a fine not exceeding ten dollars.

2 R. L., 128, § 8; Laws 1819, § 31.

§ 162. **Falsely certifying, etc., as to dues.** — An officer authorized by law to record a conveyance of real property, or of any other instrument, which by law may be recorded, who knowingly and falsely certifies that such a conveyance or instrument has been recorded, is guilty of a felony.

2 R. L., 870, § 5; 2 Laws 1828, p. 15.

§ 163. **Other false certificates.** — A public officer who, being authorized by law to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not expressly provided by law, is guilty of a misdemeanor.

New.

§ 164. **Penalty for recording, etc., without acknowledgment.** — A public officer authorized to file or record any instrument or conveyance of, or affecting property which is duly proved or acknowledged, who knowingly files or records any such instrument or conveyance which is not accompanied by a certificate according to law, of the proof or acknowledgment, is guilty of a misdemeanor.

See 1 R. L., 871, § 8.

The recording officer may refuse to register a deed acknowledged before one who had no title to the office, by virtue of which he claimed to take the acknowledgment. (*People v. Brown*, 7 Wend., 498.)

§ 165. **False auditing and paying claims.** — A public officer, or a person holding or discharging the duties of any office or place of trust under the state, or in any county, town, city or village, a part of whose duties it is to audit, allow or pay, or take part in auditing, allowing or paying claims or demands upon the state, or such county, town, city or village, who knowingly audits, allows or pays, or directly or indirectly consents to, or in any way connives at the auditing, allowance or payment of any claim or demand against the state, or such county, town, city or village, which is false or fraudulent or contains charges, items or claims which are false or fraudulent, is guilty of felony, punishable by imprisonment for not less than

two, or more than five years, or by a fine not exceeding five thousand dollars, or by both.

1 R. S., 549, § 28; Laws 1875, ch. 19, §§ 1, 2, 3.

If a supervisor, acting as a member of the board, corruptly, unlawfully and partially votes that an account presented against the county is a county charge, be allowed and made a charge against the county, he is guilty of a misdemeanor, and may be indicted therefor. (*People v. Hocking*, 50 Barb., 573.)

§ 166. False auditing and paying claims. — A person who, being or acting as a public officer or otherwise, by willfully auditing or paying, or consenting to, or conniving at the auditing or payment of a false or fraudulent claim or demand, or by any other means, wrongfully obtains, receives, converts, disposes of or pays out or aids, or abets another in obtaining, receiving, converting, disposing of, or paying out any money or property, held, owned, or in the possession of the state, or of any city, county or village, or other public corporation, or any board, department, agency, trustee, agent or officer thereof, is guilty of a felony, punishable by imprisonment for not less than three nor more than five years, or by a fine not exceeding five times the amount or value of the money or the property converted, paid out, lost or disposed of by means of the act done or abetted by such person, or by both such imprisonment and fine. The amount of any such fine when paid or collected, shall be paid to the treasury of the corporation or body injured. A conviction under this section forfeits any office held by the offender, and renders him incapable thereafter of holding any office or place of trust.

1 R. S., 549, § 28; Laws 1875, ch. 19, §§ 1-3; see § 672, *post*.

§ 167. False auditing and paying claims. — A transfer in whole or part of any deposit with any bank or other depository, or of any credit, claim or demand upon such depository, whereby the right, title or possession of the owner or holder of such deposit, or of any custodian thereof, is impaired or affected, is a conversion thereof under the last section.

1 R. S., 550, § 29; Laws 1875, ch. 19, §§ 1, 2, 3.

CHAPTER VIII.

CONSPIRACY.

SECTION 168. Conspiracy defined.

169. Conspiracies against peace, etc.

170. No other conspiracies punishable.

171. Overt act, when necessary.

§ 168. **Conspiracy defined.** — If two or more persons conspire, either

1. To commit a crime; or
2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or
3. Falsely to institute or maintain an action or special proceeding; or
4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or
5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or
6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws;

Each of them is guilty of a misdemeanor.

3 R. S., 970, § 8; 2 R. S. (Edm.), 714, § 8; 1 R. L., 173, § 8; 2 Whar. Cr. L., § 1337; 1 R. L., 173, § 8; see, also, Laws 1870, ch. 19; Laws 1860, p. 179, ch. 103, §§ 5, 6.

Any combination between two or more persons to do an unlawful act, or to do a lawful act in an unlawful manner, is indictable as a conspiracy. (*People v. Trequeer*, 1 Whar. Cr. Cas., 142; *State v. Mayberry*, 48 Met., 218; *Com. v. Hunt*, 4 Met., 111; *State v. Barnum*, 15 N. H., 396.)

(a) **Combination of journeymen.** — A combination of journeymen which attempts by threats and fines to coerce others to join in a "strike" is a conspiracy. (*People v. Melvin*, Yates' S. C., 111; 2 Whar. Cr. Cas., 269; 6 C. H. Rec., 35; *People v. Fisher*, 14 Wend., 9; *State v. Bartlett*, 30 Me., 182; *State v. Hewett*, 31 id., 396; *Com. v. Ridgeway*, 2 Ashm., 247.)

(b) **Trades unions.** — Trades unions not unlawful unless they interfere with those not members. (*Master Stevedores' Ass. v. Walsh*, 2 Daly, 1; 1 Laws 1870, ch. 19, p. 80.)

(c) **Sailors.**—A combination of sailors' boarding-house keepers not to ship any seamen at the office of certain notaries is a conspiracy. (*Emmanuel's case*, 6 C. H. Rec., 33; *People v. Melvin*, 2 Wh. Cr. C., 262; *People v. Fisher*, 14 Wend., 9; *Van Mater v. Babcock*, 23 Barb., 633.)

In 1827 an indictment did not lie for a conspiracy to cheat and defraud another by indirect means. (*Lambert v. People*, 9 Cow., 578.)

(d) **Must be to commit a crime.**—Unless the conspiracy was to commit a crime the indictment should particularly set forth the means intended to be used by the conspirators, and show them to be criminal. (*People v. Eckford*, 7 Cow., 535.)

(e) **Fraud.**—An agreement between three persons to obtain goods by fraud and false representations is an indictable conspiracy. (*Lewis' case*, 5 C. H. Rec., 129.)

(f) **Unlawful act.**—A confederation to do some act known to be unlawful must be shown. (*McDermut's case*, 4 id., 12.)

(g) **Inference of confederation.**—Any combination between two or more persons is a conspiracy when a crime is intended, whether successfully or not, and confederation may be inferred from all the circumstances. (*Storm's case*, 1 id., 169; *Adams v. People*, 9 Hun, 89.)

(h) **Deceased person.**—A prisoner may be convicted of a conspiracy with a deceased person. (*People v. Olcott*, 2 Johns. Cas., 301.)

(i) **Overt act.**—No overt act necessary to constitute the crime. (*People v. Mather*, 4 Wend., 329; *Com. v. Putnam*, 29 Penn. State, 296; *State v. Rickey*, 4 Halst., 293; *Alderman v. People*, 4 Mich., 414; *State v. Ripley*, 31 Me., 386; *Husen v. Com.*, 23 Penn. St., 355; *Isaacs v. State*, 48 Miss., 234.)

(j) **"Particeps criminis."**—All who accede to a conspiracy are guilty. (*People v. Mather*, 4 Wend., 329.)

(k) **Overt act and conspiracy.**—If the agreement be entered into in one county, and the overt act be committed in another, the conspirators may be indicted in the latter county. (*Id.*)

(l) **Venue.**—The venue may be laid in either. (*Id.*)

An indictment for conspiracy must allege that some specific act of a criminal nature was agreed to be performed, or that some lawful act was to be compassed in an unlawful manner. (*Cromwell's case*, 3 C. H. Rec., 34.)

(m) **Obtaining goods by conspiracy.**—An indictment for conspiracy to obtain goods is maintainable, though it does not set forth the means used. (*Scholls's case*, 5 C. H. Rec., 112; 2 Wh. Cr. Cas., 617.)

(n) **Suppression of evidence.**—In an indictment for a conspiracy, charging the suppression of evidence, etc., it is enough to prove that propositions of a corrupt nature were made to witness without showing the acceptance of them. (*People v. Chase*, 16 Barb., 495.)

(o) **Unlawful intent.**—The unlawful intent is to be inferred from all the circumstances of the case. (*People v. Brad*, 2 Wh. C. C., 219; *People v. Mosher*, Id., 246; *People v. Powell*, 63 N. Y., 88; 5 Hun, 169.)

(p) **Indictment.**—An indictment alleging a conspiracy to do an unlawful act to the prejudice of the people generally is enough. (*Malone's case*, 2 C. H. Rec., 22.)

(g) **Proof of overt act.**—To convict of a conspiracy it is not necessary to prove an overt act in pursuance of it. (*Duprey's case*, 4 id., 121.)

(r) **Trial.**—On the trial, on an indictment for a conspiracy to obtain a check, it is immaterial whether it was paid or not. (*Robbins' case*, 4 id., 1.)

(s) **Clerk and employer.**—A clerk may be convicted for a conspiracy with his employer. (*Id.*)

(t) **With persons unknown.**—On an indictment charging a conspiracy with A., and other persons unknown, it is enough to prove a conspiracy with any person other than A. (*Duprey's case*, 4 C. H. Rec., 121.)

(u) **Cheating and defrauding.**—On an indictment to cheat and defraud, the judgment should be several, and not joint. (*March v. People*, 7 Barb., 391.)

(v) **Act innocent in itself.**—To make an agreement between two or more parties to do an act, innocent in itself, a criminal conspiracy, it is not enough that the act is prohibited by statute, but the agreement must have been entered into with criminal intent. (*People v. Powell*, 63 N. Y., 88; 5 Hun, 169.)

(w) **Conspiracy to counterfeit.**—(*Malone's case*, 2 C. H. Rec., 22.)

(x) **Fraudulent combination to extort money.**—A fraudulent combination to extort money by commencing suits against a person is indictable as a conspiracy. (*Leggett v. Postley*, 2 Paige, 599.)

(y) **Fellow conspirators; new parties.**—Whenever a new party concurs in the plans originally formed, and comes in to aid in their execution, he becomes a fellow conspirator. (2 Esp. Cas., 719; *People v. Mather*, 4 Wend., 229.)

§ 169. **Conspiracies against peace, etc.**—If two or more persons, being out of this state, conspire to commit any act against the peace of this state, the commission or attempted commission of which, within this state, would be treason against the state, they are punishable by imprisonment in a state prison not exceeding ten years.

New.

§ 170. **No other conspiracies punishable.**—No conspiracy is punishable criminally unless it is one of those enumerated in the last two sections, and the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy.

3 R. S., 971, §§ 8, 9; 2 R. S. (Edm.), 714, § 9.

(a) **Combination of journeymen.**—A combination of journeymen which attempts by threats and fines to coerce workmen to join in a "strike," is a conspiracy. (*People v. Melvin*, Yates' S. C., 111; 2 Whar. C. C., 262; *People v. Fisher*, 14 Wend., 9.)

(b) **Trades unions.**—A trades union not indictable unless they interfere with the rights of those not members. (*Master Stevedores' Ass. v. Walsh*, 2 Daly, 1: Laws 1870, ch. 119.)

§ 171. **Overt act, when necessary.** — No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

3 R. S., 971, § 10; 2 R. S. (Edm.), 714, § 10; 2 Whar. Cr. L., § 1332.

(a) **Agreement to do an unlawful act.** — *Held*, that the crime of conspiracy to effect an unlawful act is perfect when the agreement to do the act is concluded. No overt act need be shown. (*People v. Mather*, 4 Wend., 229; *Morgan's abduction case*.)

(b) **Indictment for conspiracy.** — Under the Revised Statutes an indictment in all cases for conspiracy, except agreements to commit a felony upon the person of another, or to commit arson or burglary, must contain a charge of one or more overt acts, some one of which must be moved upon the trial. (*People v. Chase*, 16 Barb., 495.)

(c) **No overt act need be proved.** — To convict of a conspiracy it is not necessary to prove any overt act in pursuance of it. (*Duprey's case*, 4 C. H. Rec., 121.)

TITLE IX.

OF CRIMES AGAINST THE PERSON.

CHAPTER I. Suicide.

II. Homicide.

III. Maiming.

IV. Kidnapping.

V. Assaults.

VI. Robbery.

VII. Duels and challenges.

VIII. Libel.

CHAPTER I.

SUICIDE.

SECTION 172. Suicide defined.

173. No forfeiture imposed for suicide.

174. Attempting suicide.

175. Aiding suicide.

176. Abetting an attempt at suicide.

177. Incapacity of person aided, no defense.

178. Punishment of attempting suicide.

§ 172. **Suicide defined.** — Suicide is the intentional taking of one's own life.

New.

§ 173. **No forfeiture imposed for suicide.** — Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

3 R. S., 994, § 42; see § 710, *post*; *Com. v. Mink*, 228 Mass., 422; *R. v. Moody*, 6 Cox C. C., 463; *R. v. Burgess*, L. & C., 258; 9 Cox C. C., 247.

§ 174. **Attempting suicide.**—A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

New. (See § 23, *ante*; *Rea v. Doody*, 6 Cox C. C., 463; *Com. v. Dennis*, 105 Mass., 162.)

§ 175. **Aiding suicide.** — A person who willfully, in any manner, advises, encourages, abets or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

3 R. S., 932, § 7; 2 R. S. (Edm.), 680, § 7; *Blackburn v. State*, 23 Ohio St., 146; *Com. v. Bonou*, 13 Mass., 356.

To counsel another to commit suicide, and he does commit it in consequence thereof, the counselor is guilty of murder. (*Com. v. Bowen*, 2 Whar. Cr. C., 226.)

The presumption of law is that the criminal advice has the influence and effect intended by the adviser. (*Id.*)

§ 176. **Abetting an attempt at suicide.** — A person who willfully, in any manner, encourages, advises, assists or abets another person in attempting to take the latter's life, is guilty of a felony.

New. (*Blackburn v. State*, 23 Ohio St., 146; *Com. v. Bowen*, *supra*.)

§ 177. **Incapacity of person aided no defense.** — It is not a defense to a prosecution under either of the last two sections, that the person who took, or attempted to take, his own life, was not a person deemed capable of committing crime.

New.

§ 178. **Punishment of attempting suicide.** — Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.

New. (*Blackburn v. State*, 23 Ohio St., 146.)

CHAPTER II.

HOMICIDE.

SECTION 179. Homicide defined.

- 180. Different kinds of homicide.
- 181. What proof of death is required.
- 182. Common-law petit treason is homicide.
- 183. Murder in first degree defined.
- 184. Murder, second degree.
- 185. Duel fought out of this state.
- 186. Punishment of murder in first degree, how punished.
- 187. Murder in second degree, how punished.
- 188. Manslaughter defined.
- 189. Manslaughter in the first degree.
- 190. Killing unborn quick child.
- 191. Killing unborn quick child, by administering drugs, etc.
- 192. Manslaughter in first degree, how punished.
- 193. Manslaughter in second degree.
- 194. Women taking drugs, etc.
- 195. By negligent use of machinery.
- 196. Owner of animals.
- 197. Killing by overloading passenger vessel.
- 198. Liability of persons in charge of steamboats.
- 199. Liability of persons in charge of steam engines.
- 200. Liability of physicians.
- 201. Liability of persons making or keeping gunpowder contrary to law.
- 202. Punishment of manslaughter in second degree.
- 203. Homicide, when excusable.
- 204. Justifiable homicide.
- 205. Justifiable homicide.

§ 179. **Homicide defined.** — Homicide is the killing of one human being by the act, procurement or omission of another.

3 R. S., 932, § 1; 2 R. S. (Edm.), 677, § 4.

(a) **Malice.**—Homicide is presumed to be malicious until the contrary appears. (*People v. McLeod*, 1 Hill, 377; *People v. Kirby*, 2 Park., 28.)

(b) **Committed by one of several.**—If a homicide is committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the parties have united, and to effect which they have assembled, all are liable to answer criminally for the act; and if such homicide, committed within the common purpose, is murder, all are guilty of murder. (*Ruloff v. People*, 45 N. Y., 213; *Slepp v. State*, 11 Ind., 62; *People v. Woody*, 45 Cal., 289; *State v. Anthony*, 1 McCord, 285; *People v. Pool*, 27 Cal., 572; *U. S. v. Ross*, 1 Gallis, 624; *People v. Vasquez*, 49 Cal., 560; *People v. Geiger*, Id., 643; *State v. Nash*, 7 Ia., 847; *Clein v. State*, 33 Ind., 418; *People v. Knapp*, 26 Mich., 106.)

(c) **Infant.**—An infant between the age of seven and fourteen years may commit the crime of homicide. (*Godfrey v. State*, 31 Ala., 323.)

(d) **Malpractice.**—Death resulting from unskillful treatment on the part of physician may be homicide. (*Parsons v. State*, 21 Ala., 300; *State v. Scott*, 12 La., 181; *McAlister v. State*, 17 Ala., 434; *Com. v. Cortley*, 118 Mass., 1; *State v. Murphy*, 33 Ia., 270; *Com. v. Hackett*, 2 Allen, 130; *Coffman v. Com.*, 1 Bush [Ky.], 495; *State v. Morea*, 2 Ala., 275; *Parsons v. State*, 21 id., 300.)

§ 180. **Different kinds of homicide.**—Homicide is either

1. Murder;
2. Manslaughter;
3. Excusable homicide; or,
4. Justifiable homicide.

2 R. S. (Edm.), 677, § 4.

Prosecution must establish the grade of offense. There is no legal implication of murder. (*Stokes v. People*, 53 N. Y., 164.)

§ 181. (Amended 1882.) **What proof of death is required.**—

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt.

New.

(a) **Corpus delicti.**—No person can be convicted of a felony unless the *corpus delicti* be first shown. (*Plunket's case*, 3 C. H. Rec. 137; *Ruloff v. People*, 18 N. Y., 179; reversing, 3 Park., 401; *People v. Wilson*, Id., 199.)

An uncorroborated confession made out of court, without other proof of the *corpus delicti*, will not justify a conviction. (*People v. Hennessy*, 15 Wend., 147; *People v. Badgley*, 16 id., 53.)

The *corpus delicti* must be shown beyond a reasonable doubt. (*People v. Schryver*, 42 N. Y., 1; overruling, *Patterson v. People*, 46 Barb., 625; *Davis' case*, 3 C. H. Rec., 45.)

The *corpus delicti* in homicide has two components, namely, death as the result, and the criminal agency of another as the cause. There must be direct proof of the one or the other; but if one be proved by direct evidence, the other may be established by circumstances. (*People v. Bennett*, 49 N. Y., 137.)

§ 182. **Common-law petit treason is homicide.**—The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished; and those homicides are punishable, when not justifiable or excusable, as prescribed by this Code.

3 R. S., 929, § 8; 2 R. S. (Edm.), 677, § 8; 1 R. L., 67, § 3.

§ 183. (Amended 1882.) **Murder in first degree defined.**—The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed, either

From a deliberate and premeditated design to effect the death of the person killed, or of another ; or,

By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual ; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise ; or,

When perpetrated in committing the crime of arson in the first degree.

8 R. S., 928, § 5; 2 R. S. (Edm.), 677; § 5.

(a) **Intent.**—To constitute the crime of murder there must either be an intent to kill or an act imminently dangerous to others, and evincing a depraved mind, regardless of human life. (*People v. Campbell*, Edm. S. C., 307; *People v. Hayes*, Id., 582; *People v. Devine*, Id., 594.)

The intentional killing of a human being without provocation, and not in sudden combat, is murder, without regard to the degree of deliberation. It is enough that the intent to kill precede the act. (*People v. Clark*, 7 N. Y., 385; *People v. Sullivan*, Id., 396; *Walters v. People*, 6 Park., 15; 18 Abb., 147; *O'Brien v. People*, 48 Barb., 274; *Lanergan v. People*, 6 Park., 209; 50 Barb., 266; *People v. Austin*, 1 Park., 154; 7 N. Y. Leg. Obs., 17; *People v. Shay*, 4 Park., 344.)

(b) **At common law.**—To drown one's children to prevent them from coming to want is murder at common law. (*People v. Kirby*, 2 Park., 28.)

(c) **Accessory.**—The crime of an accessory before the fact is murder. (*People v. Mather*, 4 Wend., 229.)

(d) **Malice.**—Homicide is presumed to be malicious till the contrary appear. (*People v. McLeod*, 1 Hill, 377; *People v. White*, 24 Wend., 520.)

A killing by means of poison implies malice. (*People v. Sillick*, 1 Wh. Cr. Cas., 269; 1 C. H. Rec., 185.)

Killing of person disguised and armed is murder, though without intent to kill. (*People v. Van Steenberg*, 1 Park., 39.)

(e) **Dangerous weapon.**—The infliction of a deadly blow on the head with a dangerous weapon is murder in first degree. (*Foster v. People*, 50 N. Y., 598.)

The inference of an intent to kill may be drawn from the use of a deadly weapon and the manner in which it is used. (*People v. Rogers*, 13 Abb. [N. S.], 370.)

If a deadly weapon be used, the suddenness of the affray will not reduce the killing to manslaughter. (*People v. Tuhi*, 2 Wh. C. C., 242; *People v. Austin*, 1 Park., 154; *People v. Shay*, 4 id., 344.)

It is murder to discharge a loaded gun at another with malice aforethought whereby death ensues. (*Smith's case*, 2 C. H. Rec., 77.)

Where a number of persons meet together by concert, with dangerous weapons, to attack another, and death ensues, all are guilty of murder. (*People v. Garretson*, 2 Wh. Cr. C., 247; *Ruloff v. People*, 45 N. Y., 213; 5 Lans., 261; 11 Abb. Pr., 245.)

(f) **In attempting an offense less than felony.**—Where the death ensues in consequence of an intentional violence, he may be convicted of murder. (*People v. Rector*, 19 Wend., 569.)

(g) **Without premeditation.**—A killing without premeditated design to take life, though perpetrated by such acts as are eminently dangerous to the person killed, is not murder. (*Darry v. People*, 10 N. Y., 120; 2 Park., 606.)

(h) **Apprehension of danger.**—Mere apprehension of danger, followed by no overt act, will not excuse a homicide. (*Real v. People*, 42 N. Y., 270; 55 Barb., 551; 8 Abb. [N. S.], 314.) Nor will previous ill treatment on the part of the deceased. (*Id.*)

(i) **Personal hostility.**—Evidence of personal hostility on part of prisoner towards deceased is admissible. (*Friery v. People*, 2 Keyes, 424; 2 Abb. Dec., 215; 54 Barb., 319.)

Death is occasioned by a blow received, even when deceased, in a fit of delirium, tears open the wound. (*Stanton's case*, 2 C. H. Rec., 164.)

(j) **Indictment for murder.**—Revised Statutes have not changed common-law form of indictment for murder; nor has the act of 1862, dividing murder into two degrees. (*Fitzgerrold v. People*, 37 N. Y., 413; 49 Barb., 122.)

(k) **No legal implication of murder.**—On a trial for murder, the prosecution must show the grade of the offense. There is no legal implication, from the fact of the killing, that the act was murder. (*Stokes v. People*, 53 N. Y., 164.)

(l) **Proof of intoxication admissible.**—Defense may prove that prisoner was intoxicated when crime was committed. (*Eastwood v. People*, 3 Park., 25; 14 N. Y., 562.)

Jury not bound to infer the absence of premeditation from fact of intoxication. (*O'Brien v. People*, 48 Barb., 274.)

(m) **Burden of proof as to intent rests upon the prosecution.** (*Wilson v. People*, 4 Park., 619.)

(n) **Corpus delicti.**—On a trial for murder, there must be direct proof of the *corpus delicti*, that is, of the death, either by the finding and identification of the body, or by proof of criminal violence adequate to produce death, and exerted in such a manner as to account for its disappearance, before the agency of the prisoner can be established by circumstantial evidence. (*Ruloff v. People*, 18 N. Y., 179.)

Jury must be satisfied that death was the result of poison before they can convict. (*People v. Sellick*, 1 C. H. Rec., 185.)

(o) **Killing by an instrument unknown.**—In a case where the indictment charges that the killing was done by an instrument unknown, evidence that it was done by a pistol is admissible. (*People v. Colt*, 3 Hill, 432; *Real v. People*, 42 N. Y., 270; 55 Barb., 551; 8 Abb. [N. S.], 314.)

On a trial for murder of bastard child, it must be shown that it was born alive. (*Davis' case*, 3 C. H. Rec., 45.)

(p) **General verdict of guilty means murder in first degree.** (*Kennedy v. People*, 39 N. Y., 245.)

(g) **Sentence of death.** — On a general verdict of guilty upon an indictment for murder in the usual form, sentence of death may be pronounced. (*Fitzgerrold v. People*, 37 N. Y., 413; 49 Barb., 122.)

The act of 1860 did not abolish the punishment of death for murder in first degree. (*Lowenberg v. People*, 27 N. Y., 336; 5 Park., 414; see *Ratsky v. People*, 29 N. Y., 124; *McKee v. People*, 32 N. Y., 239.)

(r) **Intent, etc.** — When there is an intent to take life, the crime is murder in first degree; unless there be circumstances which reduce it to manslaughter. (*Shufflin v. People*, 4 Hun, 16; 6 S. C., 215; 62 N. Y., 229; *People v. Waltz*, 50 How., 204.)

To constitute crime of murder it is enough that the intent to kill precede the act. (*Id.*)

No particular period or amount of deliberation is necessary to constitute murder in first degree. (*Dolan v. People*, 6 Hun, 493; 64 N. Y., 485.)

The inference of intent may be drawn from the use of deadly weapon, and manner in which it is used. (*People v. Batting*, 49 How., 392.)

The fact that the prisoner used a deadly weapon, and struck at what he knew to be a vital part of the body, is evidence, though not conclusive, of an intent to take life. (*Thomas v. People*, 67 N. Y., 218.)

The killing of a wife by her husband with a premeditated design to take life, is murder in the first degree, although under the provocation of finding her in the act of adultery. (*Shufflin v. People*, 62 N. Y., 229; 4 Hun, 16.)

(s) **Intent, when engaged in felony.** — Intent is not necessary to constitute murder when engaged in a felony. (*Buel v. People*, 18 Hun, 487; 78 N. Y., 492; *Cox v. People*, 19 Hun, 430; 80 N. Y., 100; *Ruloff v. People*, 45 N. Y., 213; 5 Lans., 261.)

§ 184. **Murder second degree.** — Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

3 R. S., § 28, § 5; 2 R. S. (Edm.), 677, § 5, subd. 3.

(a) **Common-law form of indictment.** — Upon an indictment for murder in the common-law form the prisoner may be convicted of murder in the second degree. (*Keefe v. People*, 40 N. Y., 348; *People v. Thompson*, 41 id., 1.)

(b) **Must be as defined by statute.** — A prisoner cannot be convicted of murder in second degree except it be brought within statutory definition of that crime. (*People v. Skeehan*, 49 Barb., 217.)

(c) **Intent.** — To constitute murder in the second degree there must be an intent to do bodily harm to some one, though the act be immediately dangerous to others. (*People v. Sheriff of Westchester*, 1 Park., 659; 10 N. Y. Leg. Obs., 278.)

(d) **Committing another felony.** — The killing by one engaged in the commission of any other felony than that of arson in the first degree, without design to take life, is murder in the second degree. (*Fitzgerrold v. People*, 37 N. Y., 413; 3 Alb. L. J., 210.)

(e) *Id.* — In the absence of evidence tending to show that the prisoner, at the time of the homicide, was engaged in the commission of a felony, there can be no question of murder in the second degree. (*People v. Iland*, 4 Alb. L. J., 91.)

(f) **Conflicting evidence, effect of** — Upon the trial of an indictment for murder, where the evidence was conflicting, the court charged that the jury, if they believed that the evidence offered by the people to be true, would be justified in finding the prisoner guilty of murder in the second degree. *Held*, error; that the existence of the intent to kill was a question to be determined by the jury from all the facts and circumstances. (*McKenna v. People*, 81 N. Y., 360; 10 N. Y. Week. Dig., 842.)

§ 185. Duel fought out of this state.— A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried and convicted in any county of this state.

3 R. S., 928, § 6; 2 R. S. (Edm.), 677, § 6; Laws 1828, ch. 481; Code Crim. Proc., § 133; see §§ 230, 240, *post*.

To write and deliver, or cause to be delivered to another, a challenge to fight a duel, is a misdemeanor at common law. (*Norton's case*, 8 C. H. Rec., 90.)

And it is the province of the jury to determine whether the writing was intended as a challenge. (*Wood's case*, 8 C. H. Rec., 189.)

§ 186. Punishment of murder in first degree.— Murder in the first degree is punishable by death.

3 R. S., 928, § 1; 2 R. S. (Edm.), § 1; Laws 1862, ch. 197; also, Laws 1860, ch. 410; *Louvenberg v. People*, 27 N. Y., 346; 5 Park., 414; *Done v. People*, 5 Park., 364; *Ex parte Ferris*, 55 N. Y., 262; 82 How., 411; *Haggerty v. People*, 53 N. Y., 476.)

§ 187. Murder in second degree, how punished.— Murder in the second degree is punishable by imprisonment for the offender's natural life.

3 R. S., 931, § 30; 2 R. S. (Edm.), 679a, § 28; Laws 1862, ch. 197; Laws 1860, ch. 410; Laws 1847, ch. 328; Laws 1846, ch. 118.

§ 188. Manslaughter defined.— In a case other than one of those specified in sections one hundred and eighty-three, one hundred and eighty-four and one hundred and eighty-five, homicide, not being justifiable or excusable, is manslaughter.

2 R. S., 932, § 1; 2 R. S. (Edm.), 679a, § 1.

(a) **Self-defense.** — Homicide in self-defense is but manslaughter, though the prisoner did not first retreat as far as he could. (*People v. Harper*, Edm. S. C., 180.)

(b) **Accidental killing.**—If one be killed, even accidentally, through the instrumentality of another, who is engaged in an unlawful act, the killing amounts to manslaughter. (*Goodwin's case*, 5 C. H. Rec., 52.)

(c) **Any killing.**—Without design to cause death is manslaughter, unless justifiable or excusable. (*People v. Austin*, 1 Park., 291; *People v. Hamnull*, 2 Park., 223; *McCann v. People*, 6 id., 629.)

(d) **Heat of passion** reduces the grade of homicide to manslaughter. (*Wilson v. People*, 4 Park., 619.)

(e) **Death from fighting** is manslaughter, though unintentional. (*Goodwin's case*, 6 C. H. Rec., 9; *Beal's case*, Id., 59; *Patterson's case*, 8 C. H. Rec., 145; *People v. Sullivan*, 7 N. Y., 396.)

(f) **Survivor in a prize fight** is guilty of manslaughter. (*People v. Tannan*, 4 Park., 514.)

(g) **Effect of anger.**—Where a mutual combat has been for the moment terminated, and a fatal blow is afterwards struck, the question is whether there has been a sufficient time to cool, not whether in point of fact he remained in the heat of anger. (*People v. Sullivan*, 7 N. Y., 396.)

If two persons be engaged in an affray, and life be unnecessarily taken by a third who interferes to preserve the peace, it is manslaughter. (*People v. Cole*, 4 Park., 85.)

(h) **In defense of property.**—An unnecessary killing amounts to manslaughter where the act is only a trespass. (*People v. Devins*, Edm. S. C., 594.)

(i) **Carelessly killing** another by discharging a gun into the highway in night-time is manslaughter. (*People v. Fuller*, 2 Park., 16.)

(j) **Killing of an adulterer** by the husband, not in the act of adultery, is manslaughter. (*People v. Ryan*, 2 Wh. C. C., 47.)

(k) **Death by abortion** is manslaughter, unless the child has quickened. (*Evans v. People*, 49 N. Y., 86.)

(l) **Indictment for.**—Under an indictment for manslaughter, the prisoner could be convicted of any degree of the offense. (*People v. Butler*, 3 Park., 377.)

Where there is an intent to take life, the crime is murder in the first degree, unless there are circumstances that reduce the crime to manslaughter. (*People v. Waltz*, 50 How., 204.)

§ 189. **Manslaughter in the first degree.**—Such homicide is manslaughter in the first degree, when committed without a design to effect death, either

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or,

2. In the heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon.

3 R. S., 932, §§ 6, 15, 16; 2 R. S. (Edm.), 680, § 6.

(a) **Death from negligence.**—Death caused by the burning of a steam boat, resulting from making excessive fires in order to race with another boat,

is manslaughter in first degree. (*People v. Sheriff of Westchester*, 1 Park., 639; 10 N. Y. Leg. Obs., 298.)

(b) **Death in committing another offense.** — In order to constitute the crime of manslaughter in the first degree it must be shown that the prisoner was committing or attempting to commit some other offense than that of intentional violence upon the person killed. (*People v. Butler*, 8 Park., 877; *Darry v. People*, 10 N. Y., 120; 2 Park., 606; *People v. Rector*, 19 Wend., 569.)

(c) **Committing misdemeanor.** — Homicide in committing or attempting to commit a misdemeanor is manslaughter in first degree. (*People v. Rector*, 19 Wend., 569.)

(d) **Heat of passion.** — Where the killing is done in the heat of passion, while parties are engaged in a personal affray or otherwise. (*People v. Sullivan*, 7 N. Y., 396; *Patterson's case*, 3 C. H. Rec., 145; *People v. Cole*, 4 Park., 35; *People v. Johnson*, 2 id., 291; *People v. Hammill*, Id., 223; *McCann v. People*, 6 id., 629; *People v. Sheriff, etc.*, 1 id., 659; *Buel v. People*, 78 N. Y., 493, 500; *Foster v. People*, 50 id., 598.)

§ 190. **Killing unborn quick child.** — The willful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

3 R. S., 932, § 8; 2 R. S. (Edm.), 681, § 8.

(a) **Miscarriage.** — Causing the death of an unborn child in an attempt to produce miscarriage is not manslaughter under the statute unless the child has quickened. (*Evans v. People*, 49 N. Y., 86.)

It is a misdemeanor to administer drugs, etc., to a pregnant female with intent to produce a miscarriage; it is manslaughter to use the same with intent to destroy the child. (*Lohman v. People* [*Madame Restell's case*], 1 N. Y., 379; 2 Barb., 216; see, also, *People v. Stockham*, 1 Park., 434.)

§ 191. **Killing unborn quick child by administering drugs, etc.** — A person who provides supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

3 R. S., 932, §§ 9, 11, 12; Laws 1871, ch. 181, §§ 1, 2, 3; see §§ 294, 297, 318, *post*; Laws 1872, ch. 181, § 1.

(a) **Miscarriage.** — It is a misdemeanor to attempt to administer drugs to a pregnant female with intent to produce a miscarriage; it is manslaughter to use the same with intent to destroy the child. (*Lohman v. People*, 1 N. Y., 379; 2 Barb., 216; *People v. Stockham*, 1 Park., 434; *Evans v. People*, 49 N. Y.,

86, 87; *Hunt v. People*, 3 Park., 569; *Davis v. People*, 2 T. & C., 212; *People v. Davis*, 56 N. Y., 101; see, also, *Monegan v. People*, 55 N. Y., 618.)

(b) **Woman with child defined.**— *Held*, that an indictment under the statute was not rendered insufficient by the substitution therein of the words "a woman with child" for the words pregnant woman. (*Eckhardt v. People* 22 Hun, 525; 10 Week. Dig., 853.)

§ 192. **Manslaughter in first degree, how punished.**— Manslaughter in the first degree is punishable by imprisonment for not less than five nor more than twenty years.

3 R. S., 935, § 25; 2 R. S. (Edm.), 682, § 20, subd. 1.

§ 193. **Manslaughter in second degree.**— Such homicide is manslaughter in the second degree, when committed without a design to effect death, either

1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; or,

2. In the heat of passion, but not by a deadly weapon or by the use of means either cruel or unusual; or,

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

3 R. S., 984, §§ 15, 16, 18, 23; 2 R. S. (Edm.), 681, § 10.

(a) **Wife's adultery.**— When killing was committed on account of information received of wife's adultery. (*Sanchez v. People*, 22 N. Y., 147; *People v. Ryan*, 2 W. C. C., 47; *State v. Holme*, 54 Mo., 153; *State v. John*, 8 Iredell, 830; *Sawyer v. State*, 85 Ind., 80; *State v. Samuel*, 3 Jones, 74; *State v. Neville*, 6 id., 23; *State v. Avery*, 64 N. C., 608; *People v. Norton*, 4 Mich., 67; *Lynch v. Com.*, 77 Penn. St., 505.)

(b) **Mutual combat.**— Where a mutual combat has taken place. (*People v. Sullivan*, 7 N. Y., 896; *State v. Underwood*, 57 Mo., 40; *U. S. v. Mengo*, 2 Curtis' Cr. C., 1; see, also, § 195, *post*; *People v. Johnson*, 1 Park., 291.)

(c) **Culpable negligence.**— Where the death has resulted from culpable negligence. (*People v. Westchester*, 1 Park., 659; *People v. Fuller*, 2 id., 16; *People v. Devine*, Edm. S. C., 594; *Randall's case*, 5 C. H. Rec., 541; *People v. Cole*, 4 Park., 85; *Goodwin's case*, 5 C. H. Rec., 52; 1 Wh. Cr. C., 203; *Wilson v. People*, 4 Park., 619; *Rogers v. People*, 15 How., 560.)

§ 194. **Women taking drugs, etc.**— A woman quick with child, who takes or uses, or submits to the use of any drug, medicine, or substance, or any instrument or other means with intent to produce her own miscarriage, unless the same is necessary to

preserve her own life, or that of the child whereof she is pregnant, if the death of such child is thereby produced, is guilty of manslaughter in the second degree.

3 R. S., 983, § 10; Laws 1871, ch. 181, §§ 2, 3; Laws 1872, ch. 181; see notes and cases cited under § 191, *ante*.

§ 195. By negligent use of machinery. — A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind, intrusted to his care, or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this chapter, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree.

3 R. S., 984, § 24; 2 R. S. (Edm.), 682, § 19; § 193, subd. 8, *ante*; § 196, *post*. Degrees of manslaughter defined, including that of culpable negligence, etc. (*Wilson v. People*, 4 Park., 641; *People v. Schruyver*, 42 N. Y., 5; see *People v. Austin*, 1 Park., 154.)

A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, is liable under the statute. (*Thomas v. Winchester*, 6 N. Y., 397, 409.)

§ 196. Owner of animals. — If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, and not confined, kills a human being, who has taken all the precautions which the circumstances permitted, to avoid the animal, the owner is guilty of manslaughter in the second degree.

3 R. S., 984, § 19; 2 R. S. (Edm.), 681, § 14; see § 195, *ante*, and § 640, subd. 11, *post*.

§ 197. Killing by overloading passenger vessel. — A person navigating a vessel for gain, who willfully or negligently receives so many passengers, or such a quantity of other lading on board the vessel that, by means thereof, the vessel sinks, or is upset or injured, and thereby a human being is drowned or otherwise killed, is guilty of manslaughter in the second degree.

3 R. S., 934, § 20; *Id.*, 973, § 30; 2 R. S. (Edm.), 681, § 15; 2 *id.*, 717, § 24; see, also, § 359 *post*.

Death caused by the burning of a steamboat, resulting from the making of excessive fires, when racing with another boat, is manslaughter. (*People v. Sheriff of Westchester*, 1 Park., 659; 10 N. Y. Leg. Obs., 298.)

§ 198. Liability of persons in charge of steamboats. —

A person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross neglect, or for the purpose of excelling any other boat in speed, creates or allows to be created, such an undue quantity of steam as to burst the boiler, or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

3 R. S., 934, § 21; 3 id., 973, § 31; 2 R. S. (Edm.), 681, § 16, and 2 id., 717, § 25; see §§ 360, 361, 362, *post*; *People v. Sheriff, etc., supra*.

§ 199. Liability of persons in charge of steam engines. —

An engineer or other person, having charge of a steam boiler, steam engine, or other apparatus for generating or applying steam, employed in a boat or railway, or in a manufactory, or in any mechanical works, who willfully, or from ignorance or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause any other accident, whereby the death of a human being is produced, is guilty of manslaughter in the second degree.

3 R. S., 934, § 21; Id., 973, § 31; 2 R. S. (Edm.), 717, § 25; 1 Whar. Cr. Law, § 362; see, also, §§ 360, 361, 362, 424, *post*.

§ 200. Liability of physicians. — A physician or surgeon, or person practicing as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to another person, which produces the death of the latter, is guilty of manslaughter in the second degree.

3 R. S., 934, § 22; 2 R. S. (Edm.), 682, § 17.

Where a person engaged in an unlawful practice of medicine, contrary to the statute, kills a person by administering medicines which he believes not to be dangerous to health or life, he is guilty of manslaughter. (*Marsh v. Davidson*, 9 Paige, 579.)

§ 201. Liability of persons making or keeping gunpowder contrary to law. — A person who makes or keeps gunpowder or any other explosive substance within a city or village, in any quantity or manner prohibited by law, or by ordinance of the city or village, if any explosion thereof occurs, whereby

the death of a human being is occasioned, is guilty of manslaughter in the second degree.

See Laws 1846, ch 301, § 19; see §§ 389, 636, 645, *post*.

§ 202. **Punishment of manslaughter in second degree.** Manslaughter in the second degree is punishable by imprisonment for not less than one year, nor more than fifteen years, or by a fine of not more than one thousand dollars, or by both.

3 R. S., 935, § 25; 2 R. S. (Edm.), 682, § 20, subd. 2.

§ 203. **Homicide when excusable.** — Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

3 R. S., 932, § 4; 2 R. S. (Edm.), 680, § 4; see § 223, subd. 4, *post*.

(a) **Sudden affray.** — Where a sudden affray takes place between two persons, and the weaker one in self-defense casts a stone at the other, who was the aggressor, whereby his death ensued, this is an excusable homicide. (*Stanton's case*, 2 C. H. Rec., 164; *State v. Harrie*, 63 N. C., 1.)

(b) **Prize fighting.** — The statute does not apply to a case where the deceased was killed in a fight by fists, by the prisoner, which fight had been arranged by the prisoner or his friends beforehand. (*People v. Tunnan*, 4 Park., 514; see, also, *People v. Austin*, 1 id., 154.)

§ 204. **Justifiable homicide.** — Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance, either

1. In obedience to the judgment of a competent court; or,
2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or,
3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace.

3 R. S., 932, § 23; 2 R. S. (Edm.), 679a, § 2.

(a) **Peace officer.** — A peace officer can only use sufficient force to arrest and detain a felon who he knows to have committed a crime. (*Conradty v. People*, 5 Park., 234; *State v. Gut*, 13 Minn., 341.)

(b) **Willful killing of prisoner.** — The willful killing of a prisoner who has been convicted of a misdemeanor, while he is escaping or attempting to escape, is murder, and not justifiable homicide. (*Reneau v. State of Tennessee*, 21 Alb. L. J., 57.)

§ 205. **Justifiable homicide.** — Homicide is also justifiable when committed, either

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

3 R. S., 932, § 23; 2 R. S. (Edm.), 680, § 3.

(a) **Apprehension of great danger.** — One without fault, if attacked by another, may kill his assailant, if the circumstances be such as furnish reasonable ground for apprehending a design to take his life or do him great bodily harm, and that the danger is imminent, though, in point of fact, there was no such design or danger. (*Shorter v. People*, 2 N. Y., 193; 4 Barb., 460; *Peterson v. People*, 46 Barb., 625; *People v. Lamb*, 54 id., 342; 2 Keyes, 360; 2 Abb. Pr., 148; *People v. Austin*, 1 Park., 154; *People v. Cole*, 4 id., 35; *Pfomer v. People*, Id., 558; *Uhl v. People*, 5 id., 410.)

(b) **Attack to be avoided if possible.** — Where one believes himself about to be attacked by another, it is his duty, if possible, to avoid it. The right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity. (*People v. Sullivan*, 7 N. Y., 396; *People v. Cole*, 4 Park., 35.)

(c) **Must retreat if possible.** — If a fatal blow be struck in self-defense the homicide is not justifiable, unless the prisoner first retreated as far as possible. (*People v. Harper*, Edm. S. C., 180; *Shorter v. People*, 2 N. Y., 193; 4 Barb., 460.)

(d) **Opposing felony.** — One who is opposing and endeavoring to prevent the consummation of a felony may lawfully use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, even to the killing of the felon. (*Ruloff v. People*, 45 N. Y., 213; 5 Lans., 261; 11 Abb. Pr., 245.)

(e) **What force justifiable.** — A peace officer may use sufficient force to arrest or detain a felon whom he knows has committed a crime, even to killing the criminal. (*Conraddy v. People*, 5 Park., 234.)

CHAPTER III.

MAIMING.

SECTION 206. Maiming defined ; how punished.

207. Maiming one's self to escape performance of a duty.

208. Maiming one's self to obtain alms.

209. What injury may constitute maiming.

210. Subsequent recovery of injured person, when a defense.

§ 206. **Maiming defined ; how punished.** — A person who willfully, with intent to commit a felony, or to injure, disfigure or disable, inflicts upon the person of another an injury which,

1. Seriously disfigures his person by any mutilation thereof ; or,
2. Destroys or disables any member or organ of his body ; or,
3. Seriously diminishes his physical vigor by the injury of any member or organ,

Is guilty of maiming, and is punishable by imprisonment for not less than three, nor more than fifteen years. The infliction of the injury is presumptive evidence of the intent.

3 R. S., 986, § 34; 2 R. S. (Edm.), 683, § 27; 4 Black. Com., 205; 2 Bish. Cr. Law, § 1001; *State v. Briley*, 8 Porter (Ala.), 472.

(a) **Intent — Second degree.** — A prisoner is not entitled to an instruction that the jury may convict of murder in the second degree on the theory that there might have been an attempt to maim only. (*Foster v. People*, 50 N. Y., 598.)

(b) **Lying in wait.** — To constitute the crime of mayhem under the statute there must be proof of a lying in wait, or of some other act of the prisoner indicating premeditation. (*Godfrey v. People*, 63 N. Y., 207, reversing 5 Hun, 369.)

(c) **Intentional cutting.** — To convict of mayhem under the statute, the cutting and disabling must be done on purpose, and not the result of sudden passion. (*Burke v. People*, 4 Hun, 481.)

(d) **Indictment.** — What is a sufficient indictment for mayhem under the statute. (*Tully v. People*, 67 N. Y., 15.)

§ 207. **Maiming one's self to escape performance of a duty.** — A person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled, is guilty of a felony.

New.

§ 208. **Maiming one's self to obtain alms.** — A person who inflicts upon himself an injury, such as if inflicted upon

another would constitute maiming, with intent to avail himself of such injury, in order to excite sympathy, or to obtain alms, or any charitable relief, is guilty of a felony.

New.

§ 209. **What injury may constitute maiming.** — To constitute maiming, it is immaterial by what means or instrument, or in what manner the injury was inflicted.

New. (See cases cited under § 206, *ante*.)

§ 210. **Subsequent recovery of injured person, when a defense.** — Where it appears, upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound, that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had; but the defendant may be convicted of assault in any degree.

See 1 East P. C., 898; *Chick. v. State*, 7 Humph., 161.

CHAPTER IV.

KIDNAPPING.

SECTION 211. Kidnapping defined.

212. Indictment, where triable.

213. Effect of consent of injured person.

214. Selling services of persons of color.

215. Removing from this state persons held to service in another state.

216. Penalty imposed on judicial officers.

§ 211. **Kidnapping defined.** — A person who willfully,

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained against his will; or,

2. Leads, takes, entices away, or detains a child under the age of twelve years, with intent to keep or conceal it from its parent, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or

disposition of the child, or with intent to steal any article about or on the person of the child; or,

3. Abducts, entices, or by force or fraud unlawfully takes, or carries away another, at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking, or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state, is guilty of kidnapping, and is punishable by imprisonment for not more than fifteen years.

3 R. S., 936, § 35, subd. 2; *Id.*, 937, § 44; 2 R. S. (Edm.), 684, § 28; Laws 1817, § 29; Laws 1827, ch. 848; 4 Black. Com., 209; 1 Whar. Cr. L., § 586 *et seq.*

(a) **Intent.**—Forcibly confining, inveigling or kidnapping a negro with intent to send him out of the state against his will is an offense against the statute. (*Thompson's case*, 2 C. H. Rec., 120; *Pulford's case*, 4 *id.*, 172.)

Procuring the intoxication of a sailor, with intent to get him on shipboard without his consent, is kidnapping; the offense is complete if the intent were that he should be carried out of the state, though the vessel, in fact, were not designed to leave the state. (*Hadden v. People*, 25 N. Y., 373.)

The statute making it a felony to inveigle or carry a party from the state to a party entitled or brought into this state. (*People v. Merrill*, 2 Park., 591, reversed on other grounds in 14 N. Y., 74.)

(b) **Indictment.**—What sufficient indictment in such cases. (*People v. Merrill*, 2 Park., 590.)

(c) **Former trial for abduction.**—The question whether a former trial and conviction for abduction are a bar to an indictment subsequently found for murder alleged to have been previously committed, cannot be raised and made a ground for a discharge on *habeas corpus*. Such defense can only be made available, if at all, on the trial for murder. (*People v. Ruloff*, 3 Park., 126.)

(d) **What a sufficient charge.**—Charging a person with kidnapping another and hurrying him into slavery is equivalent to the charge of kidnapping him under the statute. (*Nash v. Benedict*, 25 Wend., 645.)

§ 212. **Indictment, where triable.**—An indictment for kidnapping may be tried either in the county in which the offense was committed, or in any county through or in which the person kidnapped or confined was taken or kept, while under confinement or restraint.

3 R. S., 937, § 36; 2 R. S. (Edm.), 684, § 29; Laws 1827, ch. 848, § 1; see *People v. Merrill*, *supra*.

§ 213. **Effect of consent of injured person.**—Upon a trial for a violation of this chapter, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appear satisfactorily to the jury that such person was above the age of

twelve years, and that the consent was not extorted by threats or duress.

3 R. S., 937, § 40; 2 R. S. (Edm.), 684, § 32; Laws 1837, ch. 348, § 2.

§ 214. **Selling services of person of color.** — A person who, within this state or elsewhere, sells or in any manner transfers, for any term, the services or labor of any person who has been forcibly taken, inveigled or kidnapped in or from this state, is punishable by imprisonment in a state prison not exceeding ten years.

3 R. S., 937, § 42; 2 R. S. (Edm.), 684, § 30; Laws 1817, ch. 143, § 27; see *People v. Merrill*, 2 Park., 590; 14 N. Y., 74; also *Thompson's case*, 2 C. H. Rec., 120.

§ 215. **Removing from this state persons held to service in another state.** — A person claiming that he or another is entitled to the services of a person alleged to be held to labor or service in a state or territory of the United States who, except as authorized by special statute, takes or removes, or willfully does any act tending towards removing from this state any such person, is guilty of felony, punishable by imprisonment in the state prison not exceeding ten years, and by a penalty of five hundred dollars, recoverable in a civil action by the party aggrieved.

2 R. S. (Edm.), 684, § 32.

§ 216. **Penalty imposed on judicial officers.** — A judge, or other public officer of this state who grants or issues any warrant, certificate or other process, in any proceeding for the removal from this state of any person claimed as held to labor or service in a state or territory of the United States, except in pursuance of the statute of this state, is guilty of a misdemeanor; and in addition to the punishment therefor prescribed by law, he forfeits five hundred dollars to the party aggrieved, recoverable in a civil action.

New in form.

CHAPTER V.

ASSAULTS.

SECTION 217. Assault in first degree defined.

218. Assault in second degree.

219. Assault in third degree.

220. Assault in first degree, how punished.

221. Assault in second degree.

222. Assault in third degree.

223. Use of force or violence, declared not unlawful, etc.

§ 217. **Assault in first degree defined.**—A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another,

1. Assaults another with a loaded fire arm, or any other deadly weapon, or by any other means or force likely to produce death; or,

2. Administers to, or causes to be administered to or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

Is guilty of assault in the first degree.

3 R. S., 938, § 46; 2 R. S. (Edm.), 685, § 86.

(a) **Assault with intent to kill.**—A person who attacks another with an unlawful weapon, may be convicted of assault with intent to kill, if the crime would have been a murder had death ensued. (*O'Blenis' case*, 1 C. H. Rec., 117.)

(b) **Inference of intent.**—The law will infer an intent to kill, where the means used were such as would probably have produced death, and the crime would have been murder had death ensued. (*Hagerman's case*, 3 C. H. Rec., 73.)

(c) **Felonious assault.**—On the trial of an indictment for a felonious assault, an intent to kill may be inferred from the fact that the prisoner commenced the attack and used weapons calculated to endanger life. (*People v. Vinegar*, 2 Park., 24.)

(d) **With deadly weapon.**—To convict of an assault with intent to kill, it is not necessary to aver or prove that it was committed with a deadly weapon. (*Lenahan v. People*, 3 Hun, 164; 5 S. C., 265.)

(e) **Evidence of intent.**—An indictment for an assault with intent to kill is sustained by evidence of an intent to commit a felonious homicide though not amounting to murder. (*People v. Shaw*, 1 Park., 327.)

(f) **Assault and battery—Assault with intent.**—Under an indictment for assault and battery, the prisoner can be convicted of an assault with a dangerous weapon with intent to do bodily harm. (*Slattery v. People*, 1 Hun, 311; 3 S. C., 699.)

(g) **Pointing revolver.**—Presenting an uncocked revolver at a person is not sufficient to justify a conviction for attempting to discharge a pistol with intent to kill. (*Mulligan v. People*, 5 Park., 105.)

(*h*) **Assault with intent to commit rape.**—A prisoner may be convicted of an assault with intent to commit rape, upon a child under ten years of age, without evidence that he had actually touched her, on proof that he had decoyed her into a building for such purpose. (*Hays v. People*, 1 Hill, 361.)

(*i*) **Pursuing with dangerous weapon.**—To pursue one with a dangerous weapon, and approach so near that danger may be reasonably apprehended, is an assault. (*Fairm's case*, 5 C. H. Rec., 95.)

(*j*) **Intent may be inferred.**—Intent to kill may be inferred from all the circumstances. (*Hagaman's case*, 3 C. H. Rec., 73; *People v. Vinegar*, 2 Park., 224; *Lanahan v. People*, 3 Hun, 164; *People v. Shaw*, 1 Park., 327; *Poster v. People*, 50 N. Y., 598, 603; *O'Leary v. People*, 18 How., 157, 193.)

(*k*) **Threats.**—To sustain a conviction for an assault, a battery must have been committed, intended or threatened by the party accused. (*People v. Johnson*, 9 Week. Dig., 884.)

(*l*) **Sharp and dangerous weapon.**—To convict of an assault with a sharp, dangerous weapon, there must be proof that the weapon was sharp as well as dangerous. (*People v. Hickey*, 11 Hun, 361.)

(*m*) **Sharp, dangerous weapon defined.**—Striking with the handle of a pitchfork without pushing or thrusting with the tines, is not an assault with a sharp, dangerous weapon. (*Fillins v. People*, 69 N. Y., 101; reversing 1 Sheld., 504.)

§ 218. (Amended 1882.) **Assault in second degree.**—A person who, under circumstances not amounting to the crime specified in the last section :

1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health ; or,

2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to, or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic or anesthetic agent ; or,

3. Willfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon ; or,

4. Willfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm ; or,

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person ;

Is guilty of an assault in the second degree.

3 R. S., 938, § 46; see Laws 1854, ch. 74, § 1; see §§ 278, 358, 447, *post*.

who strikes another with the handle of a pitchfork, without

thrusting at him with its tines, guilty of assault in second degree. (*People v. Filkins*, 69 N. Y., 101.)

(a) **Intent to commit rape.** — An assault with intent to commit rape upon a girl under ten years old is an offense within the statute. (*Hays v. People*, 1 Hill, 851.)

(b) **Indecent assault.** — An indecent assault upon a female where she is a consenting party to an act involving her own dishonor, not within the statute. (*People v. Bransby*, 82 N. Y., 525.)

(c) **Intoxication.** — Not so, however, where the party assaulted is in a state of intoxication. (*People v. Quinn*, 50 Barb., 128.)

On trial of an indictment for an assault and battery it is a good defense that the alleged assault and battery consisted in arresting the complainant for petit larceny without process, and delivering him to a public officer. (*People v. Adler*, 16 Abb., 249.)

§ 219. **Assault in third degree.** — A person who commits an assault, or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of assault in the third degree.

New.

(a) **Slight touching sufficient.** — The slightest touching of another in a rude and angry manner, is an assault and battery. (*Spence v. Duffy*, 1 C. H. Rec., 89; *People v. Powers*, 1 Wheeler's Cr. C., 405.)

(b) **Pursuit, simply.** — To pursue one and approach so near that danger is to be apprehended, is an assault. (*Faime's case*, 5 C. H. Rec., 95.)

(c) **Pointing at another derisively.** — It is not, however, an assault to point a cane at another in derision, without intent to strike him. (*Goodwin's case*, 6 C. H. Rec., 9.)

(d) **Collision on highway.** — It is an assault to attempt to run against the wagon of another on the highway. (*People v. Lee*, 1 Wh. Cr. C., 864.)

(e) **Correcting scholar.** — A schoolmaster may correct a scholar with moderation. (*Morris' case*, 1 C. H. Rec., 52.)

(f) **Self-defense.** — The owner of a house who has obtained possession in a peaceable manner may maintain possession by force. (*Corey v. People*, 45 Barb., 262.)

(g) **Tenant in common.** — If one tenant in common enter into possession even by stealth, and his cotenants remove him by force, it is an assault and battery. (*Woods v. Phillips*, 43 N. Y., 152.)

(h) **Trespasser.** — Though a defendant be a trespasser, he may use force in self-defense if unnecessary violence is made use of in ejecting him. (*People v. Gulick*, Lator, 229.)

(i) **Protecting property.** — A person may use as much force as is necessary to prevent the taking of his goods by a wrong-doer, without being guilty of assault and battery. (*Gyre v. Culver*, 47 Barb. 592.)

(j) **Self protection.** — A party assailed is not deprived of the right of self protection by an omission to invoke the protection of the authorities against an anticipated assault. (*Boers v. People*, 3 Hun, 716; 63 N. Y., 625.)

(*k*) **Husband and wife.** — A husband has no right to beat his wife, but he may defend himself or others from her attacks. (*People v. Winters*, 2 Park., 10; *State v. Mabrey*, 64 N. C., 592.)

(*l*) **Indecent assault.** — To sustain a conviction of an indecent assault upon young girls under twelve years, it is not necessary to show positive resistance on their part, but only that their persons were improperly interfered with. (*People v. Court of Special Sessions*, 18 Hun, 330; *Ree v. McGavaran*, 6 Cox C. C., 64; *Ree v. Case*, 4 id., 220.)

If a party actually consents there can be no assault. (*Ree v. Cockburn*, 3 Cox C. C., 543; *Ree v. Read*, 2 Carr. & K., 957.)

(*m*) **Car conductor.** — Not an assault for a conductor to put a passenger off the train when he refuses to pay his fare, unless he uses unnecessary force. (*People v. Jilleon*, 3 Park., 234.)

(*n*) **Assault defined.** — *State v. Morgan*, 3 Ired., 386; *U. S. v. Hand*, 2 Wash. C. C., 435.

(*o*) **Menaces and threats.** — Menaces and threats not enough to constitute the crime. (*People v. Ylas*, 27 Cal., 630; *Smith v. State*, 39 Miss., 521; *Yoes v. State*, 4 Eng., 42.)

(*p*) **Must be an intent to strike.** — There must be an intent to strike to constitute an assault. (*State v. Davis*, 1 Ired. [N. C.], 121; *State v. Crow*, Id., 375; *U. S. v. Hand*, 2 Wash. C. C., 435.)

(*q*) **No words will justify an assault and battery.** — *Keyes v. Devlin*, 4 E. D. Smith, 518.

(*r*) **Accidental blow.** — Accidental blow not an offense. (*Corning v. Corning*, 6 N. Y., 97.)

(*s*) **Indictment.** — Form of indictment in assault and battery. (See *People v. Holcomb*, 4 Park., 656.)

§ 220. **Assault in first degree, how punished.** — Assault in the first degree is punishable by imprisonment for not less than five nor more than ten years.

3 R. S., 938, § 46.

§ 221. **Assault in second degree.** — Assault in the second degree is punishable by imprisonment in a penitentiary or state prison for not less than two nor more than five years, or by a fine of not more than one thousand dollars, or both.

Id.; see Laws 1854, ch. 74, § 1.

§ 222. **Assault in third degree.** — Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both.

New. (See Code Crim. Proc., § 56.)

§ 223. **Use of force or violence, declared not unlawful, etc.** — To use or attempt, or offer to use, force or violence upon

or towards the person of another, is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

3. When committed either by the party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense.

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

New in form. (See 2 R. S. [Edm.], 679a, § 2; see §§ 26, 203, 205, *ante*, § 877, *post*, §§ 88, 168, 183, Code Criminal Procedure.)

(a) **Self defense.**—A party assailed may use sufficient force to defend himself, even to the killing of his assailant. (*Shorter v. People*, 2 N. Y., 193; *Patterson v. People*, 46 Barb., 625; *People v. Lamb*, 54 *id.*, 842; 2 Keyes, 360; *People*

v. *Austin*, 1 Park., 154; *People v. Cole*, 4 id., 85; *People v. Sullivan*, 7 N. Y., 396; *Ecors v. People*, 63 id., 625.)

(b) **May protect property.**—A party may protect property in his lawful custody, even to killing a party attempting a felony. (*Ruloff v. People*, 45 N. Y., 218; 5 Lans., 261; 11 Abb. [N. S.], 245; *Gyre v. Culver*, 47 Barb., 592; *Carey v. People*, 45 id., 262; *Harrington v. People*, 6 id., 607.)

(c) **Officer may use force.**—A peace officer may use only sufficient force to make the arrest or prevent the escape. (*Conraddy v. People*, 8 Park., 234; *Hager v. Danforth*, 20 Barb., 16; *State v. Hull*, 84 Com., 182; *Golden v. State*, 1 Rich. [N. S.], 292; *Com. v. Ruggles*, 6 Allen, 588.)

(d) **Trespasser may use force.**—Even a trespasser may defend himself from wanton and unlawful violence. (*People v. Gulick*, Hill & Den. Sup., 229; *Lalor*, 229.)

A party may use whatever force is necessary to arrest an offender against law, either with or without process. (*People v. Adler*, 3 Park., 249; *People v. Wolven*, 7 N. Y. Leg. Obs., 89; *People v. McArdle*, 1 Wh. C. C., 101.)

(e) **Parent may use restraint.**—A parent may exercise such wholesome and proper restraint over a child as he deems right and proper, and may use sufficient force for that purpose. (*Hernandez v. Carnobeli*, 10 How., 433; 4 Duer, 842.)

(f) **So also of a teacher.**—*Morris' case*, 1 C. H. Rec., 55; *Gardner v. State*, 4 Ind., 632; *Com. v. Randall*, 4 Gray, 36; *Anderson v. State*, 3 Head, 455; *State v. Williams*, 27 Vt., 755.

(g) **So also of a master.**—*People v. Shifflein*, 1 Wh. C. C., 512; *People v. Phillips*, Id., 155.

(h) **Conductor may use force.**—When a passenger on a train refuses to pay his fare, the conductor may use sufficient force to eject him. (*People v. Jilson*, 3 Park., 234; *Hibbard v. N. Y. and E. R. R. Co.*, 15 N. Y., 455; *Higgins v. Waterlot, etc., R. R. Co.*, 46 N. Y., 23.)

The conductor, however, must eject the passenger in a manner consistent with his safety. (*Sanford v. Eighth ave. R. R. Co.*, 23 N. Y., 843; see, also, *Priest v. H. R. R. Co.* 10 Abb. [N. S.], 60; 40 How., 456; 2 Sweezy 595.

CHAPTER VI.

ROBBERY.

SECTION 224. Robbery defined.

225. How force or fear must be employed.

226. Degree of force immaterial.

227. Taking property secretly not robbery.

228. Robbery in first degree.

229. Robbery in second degree.

230. Robbery in third degree.

231. Punishment of robbery in first degree.

232. Punishment of robbery in second degree.

233. Punishment of robbery in third degree.

§ 224. **Robbery defined.**—Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at the time of the robbery.

3 R. S., 951, § 69; 2 R. S. (Edm.), 697, § 55.

(a) **Force an essential element.**—Force or violence in depriving a man of his property is an essential ingredient of robbery. (*Plato's case*, 2 C. H. Rec., 81; *Mahoney v. People*, 3 Hun, 202; 5 S. C., 329.)

(b) **Extortion.**—It is robbery to extort personal property from another by means of threats of an unfounded charge, known to the prisoner to be groundless. (*People v. McDaniels*, 1 Park., 198.)

Secretly picking a pocket is not robbery, there must be a putting in fear. (*Norris' case*, 6 C. H. Rec., 86.)

(d) **Snatching.**—To snatch an article from the person of another, not robbery. (*Anderson's case*, 1 C. H. Rec., 163; *McCloskey v. People*, 5 Park., 299; *People v. Hall*, 6 id., 642.)

(e) **Corpus delicti.**—What circumstances sufficient to prove the *corpus delicti* on a trial for robbery. (*Bloomer v. People*, 3 Keyes, 9; 1 Abb. Dec., 146.)

(f) **Intent.**—The question of felonious intent is for the jury. (*People v. Hall*, 6 Park., 642; *People v. McGinty*, 24 Hun, 62.)

(g) **Indictment.**—Under an indictment for robbery, the jury may convict of larceny from the person or for an assault and battery. (*Murphy v. People*, 3 Hun, 114; 5 S. C., 302.)

What is a sufficient indictment. (*Quinlan v. People*, 6 Park., 9.)

(h) **Robbery at common law.**—*Rea v. Cannon*, R. & R., 146; 1 Hale, 533; *State v. Gorham*, 55 N. H., 152; *Com. v. Humphrey*, 7 Mass., 242; *Rea v. Reane*, 2 East. P. C., 734; *Com. v. Humphreys*, 7 Mass., 242; *Long v. State*, 12 Ga., 293; see, also, 1 Whar. Crim. Law, § 846, etc.

(i) **What degree of force necessary to constitute the offense.** (*People v. McGinty*, 24 Hun, 62.)

§ 225. **How force or fear must be employed.** — To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery.

3 R. S., 951, § 69; 2 R. S. (Edm.), 697, § 55.

(a) **Taking by force.** — The force must be used in taking the property. (*Mahoney v. People*, 3 Hun, 202; *Plato's case*, 2 C. H. Rec., 31; *McCoskey v. People*, 5 Park., 299.)

(b) **Degree of force not material.** — No matter how little the force used, if it is sufficient to deprive a person of his property against his will. (*People v. McGinty*, 24 Hun, 62; see, also, *Hope v. People*, 11 W. Dig., 386; *Mahoney v. People*, 3 Hun, 202; 59 N. Y., 659.)

§ 226. **Degree of force immaterial.** — When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial.

2 R. S. (Edm.), 697, § 55; *People v. McGinty*, 24 Hun, 62; *Mahoney v. People*, 3 Hun, 202; 5 S. C., 329; 59 N. Y., 659.

§ 227. **Taking property secretly not robbery.** — The taking of property from the person of another is robbery, when it appears that although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force or fear.

2 R. S. (Edm.), 697, § 55; see *Norris' case*, 6 C. H. Rec., 86; *Anderson's case*, 1 C. H. Rec., 163; *McCloskey v. People*, 5 Park., 299; 8 id., 642.

§ 228. **Robbery in first degree.** — An unlawful taking or compulsion, if accomplished by force or fear, in a case specified in the foregoing sections of this chapter, is robbery in the first degree, when committed by a person,

1. Being armed with a dangerous weapon; or,
2. Being aided by an accomplice actually present; or,
3. When the offender inflicts grievous bodily harm or injury upon the person from whose possession, or in whose presence, the property is taken, or upon the wife, husband, servant, child, or inmate of the family of such person, or any one in his company at the time, in order to accomplish the robbery.

Id.

An act of personal violence accompanying the act of feloniously taking the personal property from the person of the prosecutor, constitutes the offense of robbery in the first degree. (*Mahoney v. People*, 3 Hun, 202; 5 S. C., 329; 59 N. Y., 659.)

(a) **Owner of property.** — To constitute the crime of robbery in the first degree it is not necessary that the person robbed should have been the actual owner of the property. (*Brooks v. People*, 49 N. Y., 456.)

(b) **Robbery defined.** — Robbery in first degree, under old statute, defined. (*Mahoney v. People*, 8 Hun, 202; 59 N. Y., 659.)

(c) **At common law, etc.** — *Moody v. People*, 20 Ill., 315; *Com. v. Cook*, 12 Metc., 98; *Com. v. Nickerson*, 5 Allen, 518; *State v. Stoyell*, 54 Me., 24.

§ 229. **Robbery in second degree.** — Such unlawful taking or compulsion, when accomplished by force or fear, in a case specified in the foregoing sections of this chapter, but not under circumstances amounting to robbery in the first degree, is robbery in the second degree, when accomplished either

1. By the use of violence; or,

2. By putting the person robbed in fear of immediate injury to his person or that of some one in his company.

3 R. S., 951, § 70; 2 R. S. (Edm.), 698, § 56.

Obtaining money through the influence of a threat to prosecute that party on an unfounded charge, may amount to robbery in the second degree. (*People v. McDaniels*, 1 Park., 198.)

Violence or threats reasonably calculated to put a man in fear is essential to constitute robbery. (*Dayton's case*, 2 C. H. Rec., 167; 6 id., 86.)

§ 230. **Robbery in third degree.** — A person who robs another, under circumstances not amounting to robbery in the first or second degree, is guilty of robbery in the third degree.

New.

§ 231. **Punishment of robbery in first degree.** — Robbery in the first degree is punishable by imprisonment for not less than ten years nor more than twenty years.

3 R. S., 951, § 71; 2 R. S. (Edm.), 698, § 57.

§ 232. **Punishment of robbery in second degree.** — Robbery in the second degree is punishable by imprisonment for not less than five years nor more than fifteen years.

Id.

§ 233. **Punishment of robbery in third degree.** — Robbery in the third degree is punishable by imprisonment for not more than ten years.

New.

CHAPTER VII.

DUELS AND CHALLENGES.

SECTION 234. Dueling defined and punished.

235. Challenger, abettor, etc.

236. Challenge defined.

237. Attempts to induce a challenge.

238. Posting for not fighting.

239. Duel outside of state.

240. Where such person may be indicted and tried.

241. Witnesses.

§ 234. **Dueling defined and punished.** — A person who fights a duel or engages in any combat with another, with deadly weapons, by previous agreement, or upon a previous quarrel, although no death or wound ensues, is punishable by imprisonment for not less than two years nor more than ten years. A person convicted under this section is thereafter incapable of holding, or of being elected or appointed to any office, or place of trust or emolument, civil or military, within the state.

3 R. S., 962, §§ 1, 4; 2 R. S. (Edm.), 708, §§ 1, 4; § 458, *post*; 2 Whar. C. Law, § 1767; *Ree v. Langley*, 2 Ld. Raymond, 1029; *Com. v. Whitehead*, 2 Boston Law Rep., 148; *Angler v. People*, 84 Ill., 486; *Com. v. Hart*, 6 J. J. Marsh., 119; *State v. Perkins*, 6 Blackf., 20; see, also, 1 R. L., 1818, p. 499, § 19. Laws 1817, ch. 1; *Herriott v. State*, 1 McMullan, 126.

The act to suppress dueling, passed November 5, 1815, is constitutional, and a conviction and judgment of disqualification under it is therefore legal and valid. (*Barber v. People*, 3 Cow., 686; 20 Johns., 457.)

§ 235. **Challenger; abettor, etc.** — A person who challenges another to fight a duel, or who sends a written or verbal message purporting or intended to be a challenge to fight a duel, or an invitation to a combat with deadly weapons, or who accepts such a challenge or message, or who knowingly carries or delivers such a challenge or message, or who is present at the time appointed for such a duel or combat, or when such a duel or combat is fought, either as second, aid or surgeon, or who advises or abets, or gives any countenance or assistance to such a duel or combat upon previous agreement, is punishable by imprisonment for not more than seven years.

3 R. S., 962, § 2; 2 R. S. (Edm.), 708, § 2; Laws 1828, ch. 481, § 2; Laws 1818, 499, § 19; *Ree v. Langley*, 2 Ld. Raymond, 1029; *State v. Perkins*, 6 Blackf., 20.

To write and deliver, or cause to be delivered, to another a challenge to fight a duel is a misdemeanor at common law. (*Norton's case*, 3 C. H. Rec., 90; see, also, *Woods' case*, 3 id., 139.)

§ 236. **Challenge defined.**—Any word, spoken or written, or any sign, uttered or made to any person, expressing or implying, or intended to express or imply, a desire, request, invitation or demand to fight a duel, or to meet for the purpose of fighting a duel, is deemed a challenge.

New in form. (2 R. S. [Edm.], 708, § 2.)

It is the province of the jury to determine whether the writing was intended as a challenge. (*Wood's case*, 3 C. H. Rec., 139; see, also, 459, *post*; and *State v. Perkins*, 6 Blackf., 20; *Com. v. Tibbs*, 1 Dana, 524.)

§ 237. **Attempts to induce a challenge.**—A person guilty of sending or using to another any word or sign whatever, with intent to provoke or induce such person to give or receive a challenge to fight a duel, is guilty of a misdemeanor.

New in form. (See *King v. Phillips*, 6 East, 464; *Rez v. Rice*, 3 id., 581.)

§ 238. **Posting for not fighting.**—A person who posts or advertises another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who, in writing or in print, uses reproachful or contemptuous language to or concerning any one, for not sending or accepting a challenge to fight a duel, or for not fighting a duel, is guilty of a misdemeanor.

3 R. S., 972, § 19; 2 R. S. (Edm.), 716, § 20; *Vermont v. Davidson*, 30 Vt., 377.

§ 239. **Duel outside of state.**—A person who leaves this state with intent to elude any provision of this chapter, or to commit any act without this state, which is prohibited by this chapter, or who being a resident of this state, does any act without this state, which would be punishable by the provisions of this chapter, if committed within this state, is guilty of the same offense, and subject to the same punishment, as if the act had been committed, or was to have been consummated within this state.

3 R. S., 963, § 5; 2 R. S. (Edm.), 706, § 5; Id., 677, § 6; *Rez v. Williams*, 2 Comp., 506; see Code Crim. Proc., § 133; § 188, *ante*, § 461, *post*; *State v. Taylor*, 3 Brev., 243; *Harris v. State*, 58 Ga., 332; *Ivey v. State*, 12 Ala., 276; Laws 1816, ch. 4, § 5.

§ 240. **Where such person may be indicted and tried.**—A person offending against any provision of the last section may

be indicted and tried in any county within this state; but the person so offending may plead a former conviction or acquittal in another state or country for the same offense; and if such plea is admitted or established, it shall be a bar to further proceedings against him, for such offense.

3 R. S., 963, §§ 6, 7; 2 R. S. (Edm.), 706, §§ 6, 7; see § 185, *ante*.

§ 241. **Witnesses.**—A person offending against any provision of this chapter is a competent witness against any other person offending in the same transaction, and must not be excused from testifying or answering any question, upon an investigation or trial for an offense under this chapter, upon the ground that his testimony might tend to convict him of a crime. But evidence given by a person so testifying, cannot be received against him, in any criminal action or proceeding.

3 R. S., 963, § 8; 2 R. S. (Edm.), 706, § 8; see § 712, *post*; *State v. Dupont*, 2 McCord, 384; Whart. Cr. Ev., § 698; 2 Whart. Cr. Law, § 1778; see, also, *Wood's case*, 3 C. H. Rec., 139.

CHAPTER VIII.

LIBEL.

SECTION 242. Libel defined.

243. Libel a misdemeanor.

244. Malice presumed, defense to prosecution,

245. Publication defined.

246. Liability of editors and others.

247. Publishing a true report of public official proceedings.

248. Qualification of last section.

249. Indictment against resident.

250. Indictment against non-resident.

251. Indictment; punishment restricted.

252. Indictment; power of court, place of trial.

253. Privileged communications.

254. Threatening to publish libel.

§ 242. **Libel defined.**—A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or asso-

ciation of persons, in his or their business or occupation, is a libel.

Any writing published maliciously, with a view to expose another to contempt and ridicule, is a libel. (*Steele v. Southwick*, 9 Johns., 214; *Spooner's case*, 8 C. H. Rec., 27; *People v. Judah*, 2 Wh. Cr. Cas., 26.)

Any publication or picture which holds up a person to public ridicule is a libel. (*Mezzara's case*, 2 C. H. Rec., 113.)

A publication which reflects upon the plaintiff and his business is a libel. (*Fry v. Bennett*, 28 N. Y., 324; 8 Bosw., 200.)

If the communication is not privileged or capable of innocent construction, it is the duty of the judge to charge the jury that it is libelous. (*Hunt v. Bennett*, 19 N. Y., 173; 4 E. D. Smith, 647.)

(a) **Malice** is an implication of law from the false and injurious nature of the charge. (*Root v. King*, 7 Cow., 613; 4 Wend., 114; *Washburn v. Cook*, 3 Den., 110.)

(b) **Business or profession.** — In libel, that the words used had reference to plaintiff's profession and business is not substantive ground of slander. (*Sanderson v. Caldwell*, 45 N. Y., 398.)

(c) **Court proceedings.** — A party may publish a correct account of court proceedings; but if he garbles or falsifies them, it is libelous. (*Thomas v. Cronwell*, 7 Johns., 264; *Wilcox v. Bennett*, 1 U. S. Law Mag., 131; *Steele v. Southwick*, 9 Johns., 214.)

(d) **Correct narrative may be libelous.** — The publication of a correct narrative of a transaction may be libelous if accompanied by unjust deductions from the facts. (*Edsall v. Brooks*, 2 Rob., 29; 26 How., 426.)

A publication stating that the plaintiff is about to commence a suit for libel, but that he will not bring it to trial in a particular county because he is known there, is libelous. (*Cooper v. Greeley*, 1 Den., 347.)

(e) **An illegal process not libelous.** — *Bailey v. Dean*, 5 Barb., 297.

(f) **Member of the bar.** — To charge a member of the bar as offering himself as a witness in order to divulge the secrets of his client is libelous. (*Biggs v. Denniston*, 3 Johns. Cases, 198.)

(g) **Maltster.** — Charging a maltster with using filthy water in brewing is libelous without proof of special damage. (*White v. Delavan*, 17 Wend., 49.)

(h) **Candidate for office.** — Charging a candidate with corruption is libelous. (*Powers v. Dubois*, 17 Wend., 63.)

(i) **Libeling a senator.** — Charging a senator with corrupt conduct as senator is actionable though his term of office had expired before its publication. (*Cramer v. Riggs*, 17 Wend., 209.)

(j) **Charging a politician with corruptly using money** is libelous *per se*. (*Weed v. Foster*, 11 Barb., 203.)

(k) **A charge of smuggling is libelous.** — *Stillwell v. Barter*, 19 Wend., 487.

(l) **An imputation of poverty** may be libelous, if so alleged as to excite nothing but ridicule. (*Moffat v. Cauldwell*, 3 Hun, 26; 5 S. C., 256.)

(m) **Kidnapping.** — A charge of kidnapping another and bringing him into slavery is libelous. (*Nash v. Benedict*, 25 Wend., 645.)

(n) **Malefeasance in office.**—A petition asking for the removal from office for malefeasance not libelous without proof of malice. (*Thorn v. Blanchard*, 5 Johns., 508.)

(o) **Libeling military officer.**—A publication reflecting upon officers of a regiment not libelous without proof of special damage. (*Sumner v. Buel*, 12 Johns., 475; *Ryckman v. Delavan*, 25 Wend., 186.)

(p) **Publishing letter.**—Charging an editor with publishing a private letter without authority is not libelous *per se*. (*Bacon v. Beach*, 5 N. Y. Leg. Obs., 448.)

(q) **Corporation.**—A corporation may maintain an action for libel, though the words be not actionable *per se*, on proof of malice and special damage to its business, credit or property. (*Knickerbocker L. Ins. Co. v. Ecclesine*, 2 J. & Sp., 76; 42 How., 202; *Shoe and Leather Bank v. Thompson*, 23 id., 253; 18 Abb., 418.)

(r) **Silver mine.**—A publication charging the plaintiff with having plastered the Emma Silver Mine, and engrafted silver ore in the lime-stone rocks for the purpose of swindling the public, is a libel. (*Williams v. Godlan*, 5 Daly, 499.)

(s) **Blackmailing.**—The use of the word "blackmailing" is libelous *per se*. (*Robertson v. Bennett*, 12 J. & Sp., 66.)

(t) **At common law.**—See, also, *State v. Burnham*, 9 N. H., 84; *Com. v. Holmes*, 17 Mass., 336; *Com. v. Kneeland*, 20 Pick., 206; *State v. Avery*, 7 Conn., 268; see, also, 2 Wharton's Crim. Law, § 1594.

§ 243. **Libel a misdemeanor.**—A person who publishes a libel is guilty of a misdemeanor.

New. (See 2 Chitty Cr. L., 875; 2 Whart. Cr. L., § 1594; *State v. Avery*, 7 Conn., 268; *State v. Burnham*, 9 N. H., 84; *Com. v. Holmes*, 17 Mass., 336; *Com. v. Kneeland*, 20 Pick., 206.)

§ 244. **Malice presumed; defense to prosecution.**—A publication having the tendency or effect, mentioned in section two hundred and forty-two, is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public.

N. Y. State Const., art. I, § 8; see Code Civ. Proc., §§ 535, 536.

(a) **Malice implied.**—Malice is an implication of law from the false and injurious nature of the charge. (*Root v. King*, 7 Cow., 613; 4 Wend., 114; *Wasburne v. Cook*, 3 Den., 110.)

(b) **When malice must be proved.** — A petition for the removal of an official for malfeasance not libelous without direct proof of malice. (*Thorn v. Blanchard*, 5 Johns., 508.)

(c) **Rumor.** — That a charge was made on mere rumor is no justification. (*Powers v. Skinner*, 1 Wend., 451.)

(d) **Article copied.** — That an article published was copied is no defense. (*Hotchkiss v. Oliphant*, 2 Hill, 510.)

Nor that the author's name was given. (*Dole v. Lyon*, 10 Johns., 447.)

(e) **Literary criticism.** — A fair criticism of a literary work, however severe, is privileged, if done without unworthy motives. (*Reade v. Sweetser*, 6 Abb. [N. S.], 9, n.)

(f) **Truth must be established.** — Truth must be established, and goes to the intent. (*Bice v. Withers*, 9 Wend., 138; *People v. Tracy*, 2 Wh. Cr. Cas., 358.)

(g) **Motive.** — The motive must be justifiable. (*Baldwin's case*, 8 C. H. Rec., 61.)

Mitigating circumstances must be pleaded in connection with a denial of malice. (*Daly v. Byrne*, 1 Abb. N. C., 150.)

(h) **Good motives.** — Good motives and justifiable ends must be shown. (*Bartholomy v. People*, 2 Hill, 248; see *Snyder v. Andrews*, 6 Barb., 43.)

(i) **Justification.** — Justification in answer set up must be definite and certain. (*Id.*)

And must be as broad as the charge. (*Skinner v. Powers*, 1 Wend., 451; *Stihell v. Barter*, 19 id., 487; *Fidler v. Delevan*, 20 id., 57; *Cooper v. Barber*, 24 id., 105.)

§ 245. **Publication defined.** — To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

Laws 1852, ch. 165, § 1.

(a) **Sealed letter.** — Sending a letter to the plaintiff sealed is not a publication which will sustain a private suit. (*Lyle v. Clason*, 1 Cai., 581; *Waistel v. Holman*, 2 Hall, 172.)

(b) **Reading letter to stranger.** — A writer reading a libelous letter to a stranger before sending it, is a publication. (*Snyder v. Andrews*, 6 Barb., 43; *Van Cleef v. Lawrence*, 6 C. H. Rec., 41.)

(c) **In another state.** — A libel published in another state not actionable here. (*Trumbull v. Gibbons*, 8 id., 97.)

To deliver a libel to a man's wife in confidence, is not publication. (*Id.*)

(d) **Proprietor of paper liable.** — The proprietor of a newspaper is liable for libelous matter published therein without his knowledge. (*Andres v. Wells*, 7 Johns., 240; *Huff v. Bennett*, 4 Sandf., 120; *Fry v. Bennett*, 28 N. Y., 324; 3 Bosw., 300.)

(e) **Proof of publication in a newspaper.** (*Southwick v. Stevens*, 10 Johns., 443; *Huff v. Bennett*, 4 Sandf., 120.)

That the publication was in cipher and only understood by a small class of people does not affect the defendant's liability. (*Sunderlin v. Bradstreet*, 48 N. Y., 188.)

A receiver in chancery of a newspaper is liable for libelous publications therein. (*Marten v. Van Schaick*, 4 Paige, 479.)

§ 246. **Liability of editors and others.**— Every editor, or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him so soon as known.

New in form. (See Laws 1854, ch. 180, §§ 1, 2, 3.)

(a) **Want of knowledge.**— An action for a libel lies against the proprietor of a newspaper though the libelous matter was published without his knowledge. (3 Esp., 21; *Andres v. Wells*, 7 Johns., 260; *Huff v. Bennett*, 4 Sandf., 120; 6 N. Y., 337; *Fry v. Bennett*, 28 N. Y., 324; 3 Bosw., 200; *Cain v. Kneeland*, Thatch. Cr. R., 846; *Rex v. Gatch*, 1 Moo. & M., 433.)

(b) **Receiver liable.**— A receiver in chancery of a newspaper also liable. (*Martin v. Van Schaick*, 4 Paige, 479.)

(c) **Assignment for security.**— Not so, however, where a printing press and newspaper are assigned merely as security for a debt. (*Andres v. Wells*, 7 Johns., 260.)

§ 247. **Publishing a true report of public official proceedings.**— A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein, of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report.

8 R. S., 1026. § 84: Laws 1854, ch. 180, § 1; § 148 *ante*.

(a) **Fair and true report defined.**— What is a fair and true report defined. (*Ackerman v. Jones*, 37 N. Y. Supr., 42.)

Though one may publish a correct and true account of the proceedings in a court of justice, yet if he discolor or garble the proceedings, or add comments or insinuations of his own, he is libelous. (*Thomas v. Crowell*, 7 Johns., 264; *Wilcox v. Bennett*, 1 U. S. Law Mag., 131; *Stanley v. Webb*, 4 Sandf., 21.)

(b) **Contradictions.** — Positive contradiction of what a witness had sworn to on a trial not libelous in itself, unless accompanied by something tending to expose the party to ridicule. (*Steele v. Southwick*, 9 Johns., 214.)

(c) **True narrative may be libelous.** — The publication of a correct narrative of a transaction may be libelous if it contain unwarranted deductions from the facts. (*Edsall v. Brooks*, 2 Rob., 29; 26 How., 426; *Sandford v. Bennett*, 24 N. Y., 20; *McCabe v. Cauldwell*, 18 Abb., 377; *Thomas v. Croswell*, 7 Johns., 264.)

Proceedings before grand jury not those of a judicial body, within the statute. (*McCabe v. Cauldwell*, 18 Abb., 377.)

§ 248. **Qualification of last section.** — The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any other person concerned in the publication; or in the report of any thing said or done at the time and place of the public and official proceeding, which was not a part thereof.

3 R. S., 1026, § 85; Laws 1854, ch. 130, § 2; see *Stanley v. Webb*, 4 Sandf., 21.)

§ 249. **Indictment against resident.** — An indictment for a libel, contained in a newspaper published within this state, against a resident thereof, may be found either in the county where the paper was published, or in the county where the person libeled resided when the offense was committed. In the latter case the defendant is entitled to an order of the Supreme Court, directing the indictment against him to be tried in the county in which the paper was printed and published, upon compliance with the following conditions:

1. He must apply for the order within thirty days after being committed upon, or giving bail to answer, the indictment;

2. He must execute a bond to the complainant, with two sufficient sureties, approved by the judge hearing his application, in a penal sum fixed by the judge, not less than two hundred and fifty nor more than one thousand dollars, conditioned for the payment, in case the defendant is convicted, of all the complainant's reasonable expenses in going to and from his place of residence and the place of trial, and in attendance upon the trial;

3. He must, within ten days after the granting of the order, file the order and deposit the bond with the clerk of the county in which the indictment is pending.

Laws 1852, ch. 165, § 1; 3 R. S., 1025, § 80; Code Crim. Proc., § 138.

§ 250. **Indictment against non-resident.** — An indictment for a libel published against a person not a resident of this state, must be found and tried in the county where the paper containing the libel purports upon its face to be published; or, if no county is indicated upon the face of the paper, in any county where the paper was circulated.

3 R. S., 1025, § 81; Laws 1852, ch. 165, § 2; Code Crim. Proc., § 138; see *Trumbull v. Gibbons*, 3 C. H. Rec., 97.

§ 251. **Indictment; punishment restricted.** — A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county.

3 R. S., 1025, § 82; Laws 1852, ch. 165, § 1; Code Crim. Proc., § 138.

§ 252. **Indictment; power of court, place of trial.** — Nothing contained in this chapter shall be construed to abridge, or in any manner affect, the power of a competent court, to change the place of trial of an indictment for libel, in the same manner as may lawfully be done, in respect to any other indictment.

3 R. S., 1025, § 83; Laws 1852, ch. 165, § 4.

§ 253. **Privileged communications.** — A communication made to a person entitled to, or interested in the communication, by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication.

New in form. (3 R. S., 969, § 2.)

(a) **Privileged on its face.** — Where a communication is privileged on its face, plaintiff must show both malice and want of probable cause. (*Streety v. Wood*, 15 Barb., 105.)

(b) **Legislative or judicial proceedings,** are privileged. (*Kelly v. Taintor*, 48 How., 270; *Thorn v. Blanchard*, 5 Johns., 508.)

(c) **Board of excise.** — A memorial addressed to the board of excise against granting license to a particular individual, privileged. (*Vandersee v. McGregor*, 12 Wend., 545.)

(d) **When probable cause must be shown.** — *Howard v. Thompson*, 21 Wend., 319; *Cook v. Hill*, 3 Sandf., 341; *O'Donaghue v. McGovern*, 23 Wend., 26.

(e) **Secret society.** — A charge against one member by another in a matter which the society can investigate, is privileged. (*Streety v. Wood*, 15 Barb., 105.)

(f) **Violation of official duty.**—A charge of violation of official duty, made to proper authorities, is privileged. (*Van Wyck v. Aspinwall*, 17 N. Y. 190; 4 Duer, 268.)

(g) **Fire marshal.**—Complaint to a fire marshal as to origin of fire privileged. (*Newfield v. Copperman*, 47 How., 87; 15 Abb. [N. S.], 360.)

(h) **An address to the electors** of the state, before election, signed as chairman of a public meeting, not privileged. (*Lewis v. Few*, 5 Johns., 1; *Hunt v. Bennett*, 19 N. Y., 173; 4 E. D. Smith, 647.)

Especially if it reflects upon a candidate. (*Hunt v. Bennett*, 19 N. Y., 173; *Root v. King*, 7 Cow., 613; 4 Wend., 114.)

(i) **Manager of opera-house.**—A reflection upon the manager of an opera-house not privileged. (*Fry v. Bennett*, 8 Bosw., 200.)

(j) **Literary criticism.**—A fair criticism of a literary work, however severe, is privileged, unless it imputes unworthy motives to the author. (*Reed v. Sweetzer*, 6 Abb. [N. S.], 9n; *Fry v. Bennett*, 5 Sandf., 54; 9 N. Y. Leg. Obs., 330; *Cooper v. Stone*, 24 Wend., 434.)

(k) **Mercantile agency.**—Information furnished by a mercantile agency to all its customers, irrespective of their interest in the question, is not privileged, though given in good faith. (*Taylor v. Church*, 8 N. Y., 453; 1 E. D. Smith, 279; *Sunderlin v. Bradstreet*, 46 N. Y., 188; *Lewis v. Chapman*, 16 N. Y., 369.)

An affidavit before the governor, he not having jurisdiction, is not privileged. (*Homer v. Loveland*, 19 Barb., 111.)

(l) **Attorney's advice** to client is privileged, unless express malice be shown. (*Washburn v. Cook*, 3 Den., 110.)

An attorney's declarations not pertinent to the controversy are otherwise. (*Gilbert v. People*, 1 Den., 41; *Star v. Selden*, 4 N. Y., 91.)

(m) **Express malice** must be shown where the alleged libel is contained in papers used in a former suit, and which defendant believed to be true. (*Suydam v. Moffatt*, 1 Sandf., 459; *Warner v. Paine*, 2 id., 191.)

(n) **Privilege of counsel** extends to all matters pertinent to the controversy, irrespective of motive. (*Marsh v. Ellsworth*, 50 N. Y., 309; 1 Sweeny, 52; 36 How., 532; 2 Sweeny, 539.)

(o) **Falsity of the charge** is inadmissible where the report is privileged. (*Ackerman v. Jones*, 5 J. & Sp., 42.)

(p) **Ex parte proceedings.**—Publication of *ex parte* proceedings before a police magistrate not privileged. (*Stanley v. Webb*, 4 Sandf., 21; 8 N. Y. Leg. Obs., 209.)

(q) **Grand jury proceedings** are not privileged. (*McCabe v. Cauldwell*, 18 Abb. Pr., 377.)

(r) **Slanderous words uttered by a murderer** at the time of his execution are not privileged when published. (*Sanford v. Bennett*, 24 N. Y., 20.)

(s) **Persons jointly interested.**—An agreement made between persons interested in a prosecution to push the same is privileged, even if exhibited to an outside party. (*Klinck v. Colby*, 46 N. Y., 427.)

(t) **Physician's certificate**, given in good faith, that another is insane, is privileged. (*Perkins v. Mitchell*, 81 Barb., 461.)

The publication in a public journal of an article charging a member of corruption is not privileged. (*Littlejohn v. Greeley*, 18 Abb., 41.)

(u) **Communications.** — Communications made to the board of directors of a charitable institution regarding an employe, if made in good faith and without malice, are privileged. (*Halstead v. Nelson*, 24 Hun, 395.)

(v) **Court must determine what is privileged.** — In an action for libel it is for the court to determine whether the alleged libel was privileged or not; but the question of good faith, etc., is for the jury. (*Hamilton v. Eno*, 81 N. Y., 116.)

To accuse one holding a public office of an offense is not privileged. (*Id.*)

§ 254. **Threatening to publish libel.** — A person who threatens another with the publication of a libel, concerning the latter or concerning any parent, husband, wife, child or other member of the family of the latter, and a person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort, money or other valuable consideration from any person, is guilty of a misdemeanor.

3 R. S., 969, § 2; 2 R. S. (Edm.), 713, § 2.

TITLE X.

OF CRIMES AGAINST THE PERSON AND AGAINST PUBLIC DECENCY AND GOOD MORALS.

- CHAPTER I. Crimes against religious liberty and conscience.
- II. Rape, abduction, carnal abuse of children and seduction.
 - III. Abandonment and neglect of children.
 - IV. Abortions and concealing death of infant.
 - V. Bigamy, incest and the crime against nature.
 - VI. Violating sepulture and the remains of the dead.
 - VII. Indecent exposures, obscene exhibitions, books and prints and disorderly houses.
 - VIII. Lotteries.
 - IX. Gaming.
 - X. Pawnbrokers.

CHAPTER I.

OF CRIMES AGAINST RELIGIOUS LIBERTY AND CONSCIENCE.

SECTION 255. Profane swearing defined.

256. Punishment of profane swearing.

257. Summary conviction for profane swearing.

SECTION 258. Penalties, how collected.

- 259. The Sabbath.
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- 263. Servile labor.
- 264. Persons observing another day as a Sabbath.
- 265. Public sports.
- 266. Trades, manufactures and mechanical employments.
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- 268. Serving process.
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- 270. Forfeiture of commodities exposed for sale.
- 271. Remedy for maliciously serving process.
- 272. Compelling adoption of a form of belief.
- 273. Preventing performance of religious acts.
- 274. Disturbing religious meeting.
- 275. Definition of the offense.
- 276. Processions and parades.
- 277. Theatrical and other performances.

§ 255. Repealed in 1882.

1 R. S., 374, §§ 61, 63; 2 R. L., 195, §§ 6, 7, 8; 1 Hawk. P. C., 358; *State v. Powell*, 70 N. C., 67; *State v. Graham*, 3 Sneed, 64; *Holcomb v. Cornish*, 8 Conn., 375; *Com. v. Hardy*, 1 Ash., 410; *State v. Pepper*, 68 N. C., 259; *Barker v. Com.*, 19 Penn. State, 13; *Bill v. State*, 1 Swan, 42; 2 Whar. C. L., § 1443; *State v. Chandler*, 2 Harrington, 553.

(a) **Heat of political dispute.** — The utterance of blasphemous words in the heat of political dispute is not indictable for blasphemy. (*Bell's case*, 6 C. H. Rec., 38.)

(b) **Offense at common law.** — Blasphemous words against God, contumelious reproaches and profane ridicule of Christ, or the Holy Scriptures, are offenses punishable at common law, whether uttered by words or in writing. (*People v. Ruggles*, 8 Johns., 290.)

§ 256. Repealed in 1882.

2 R. S., 926, § 73; 2 R. L., 195, §§ 6, 7, 8; *Barker v. Com.*, 19 Penn. St., 412; *State v. Graham*, 3 Sneed., 134.)

Under 1 Revised Statutes, §§ 61-63, a person who used profane language was finable one dollar for each offense, and in default of payment may be committed to the county jail for not less than one nor more than three days. (*Foland v. Johnson*, 16 Abb., 235.)

§ 257. Repealed in 1882.

2 R. S., 926, § 73; see *Foland v. Johnson. supra.*

§ 258. Repealed in 1882.

Id., § 75; see *Foland v. Johnson, supra.*

§ 259. **The Sabbath.** — The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

New.

§ 260. **Sabbath breaking.** — A violation of the foregoing prohibition is Sabbath breaking.

New.

§ 261. **Day defined.** — Under the term "day," as employed in the phrase "first day of the week," when used in this chapter, is included all the time from midnight to midnight.

New. (*Pulling v. People*, 8 Barb., 384; see, also, *Vanderwerker v. People*, 5 Wend., 530.)

§ 262. **Acts forbidden.** — The following acts, as explained in the next six sections, are those forbidden to be done on the first day of the week, except in a work of necessity or charity :

1. Servile labor ;
2. Public sports and shows ;
3. Trades, manufactures, or mechanical employments ;
4. Public traffic ;
5. Serving process.

New in form. (2 R. S., 928, §§ 83-96; 2 R. L., 195, § 5; Laws 1847, ch. 849, § 1; Laws 1857, ch. 628, § 21; Laws 1870, ch. 80, §§ 1, 2, 6, 8; Laws 1871, ch. 721, § 15; Laws 1873, ch. 551; see, also, §§ 263, 265, 267, 268, *post*.)

(a) **Private sale of property.** — A private sale of property not exposed for sale not prohibited. (*Eberle v. Mehrbach*, 55 N. Y., 682; *Batsford v. Every*, 44 Barb., 618; *Miller v. Roessler*, 4 E. D. Smith, 234.)

(b) **Legal process.** — Process cannot be issued or served on Sunday. (*Van Vechten v. Paddock*, 12 Johns., 178; *Rob v. Moffatt*, 3 Johns., 257.)

Nor made returnable. (*Gould v. Spencer*, 5 Paige, 541.)

(c) **Admitting service of process.** — Even when a defendant admits service on Sunday a process is void. (*Vanderpoel v. Wright*, 1 Cow., 209.)

(d) **Servile labor.** — What is such servile labor as is forbidden. (*People v. Lyons*, 5 Hun, 643.)

(e) **Sabbath agreement.** — An agreement to make an ascension in a balloon from a public garden is a contract for servile labor. (*Brunnell v. Clark*, 1 Sheld., 500.)

(f) **Work performed Sunday.** — Work performed on Sunday not necessarily illegal. Works of necessity are excepted by the statute. (*Sun Printing and Pub. Ass. v. Tribune Ass.*, 12 J. & Sp., 186.)

(g) **Protecting property.**—Property in danger of destruction may be rescued on Sunday. (*Parmales v. Wilks*, 22 Barb., 539.)

(h) **Liquor selling on Sunday.**—*Brooklyn v. Toynbee*, 81 Barb., 282.

§ 263. **Servile labor.**—All manner of servile labor, on the first day of the week, is prohibited, excepting in works of necessity or charity.

2 R. S., 928, § 84; Laws 1871, p. 1533, ch. 702.

Works of necessity are excepted by the statute. (*Sun Pub. Co. v. Tribune Ass.*, 12 J. & Sp., 186; *Morris v. State*, 81 Ind., 189; *State v. Goff*, 20 Ark., 289; *Parmales v. Wilks*, 22 Barb., 539.)

§ 264. **Persons observing another day as a Sabbath.**—It is a sufficient defense to a prosecution for servile labor on the first day of the week, that the defendant uniformly keeps another day of the week as holy time, and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

2 R. S., 928, § 84; *Isaacs v. Beth Hamedash Soc.*, 1 Hilt., 469; *Maxson v. Annas*, 1 Den., 204.

§ 265. **Public sports.**—All shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercises, pastimes or shows, upon the first day of the week, and all noise disturbing the peace of the day, are prohibited.

8 R. S., 928, § 84; 2 Laws 1871, p. 1672, ch. 721, § 15; 2 Laws 1867, p. 2312, ch. 909; Laws 1860, p. 999, ch. 501; 2 Laws 1872, p. 1433, ch. 590, § 3.

The Laws of 1815 prohibited fishing in the Hudson on Sunday. (*Sickles v. Sharp*, 18 Johns, 497.)

It is no defense to an action for a personal injury that the parties were at the time practicing an unlawful game on Sunday. (*Eitchberg v. Levielle*, 2 Hilt., 40.)

§ 266. **Trades, manufactures and mechanical employments.**—All trades, manufactures and mechanical employments upon the first day of the week are prohibited.

Id.

§ 267. **Public traffic.**—All manner of public selling, or offering, or exposing for sale publicly, of any commodities upon the first day of the week is prohibited, except that meats, milk and fish may be sold at any time before nine o'clock in the morning, and except that food may be sold to be eaten upon the

premises where sold, and drugs, medicines and surgical appliances may be sold at any time of the day.

2 R. S., 929, § 85.

(a) **A private contract.**—A private contract made on Sunday is valid. (*Boyton v. Paige*, 13 Wend., 425.)

A private contract for the sale of a span of horses made on Sunday, not void. (*Batesford v. Every*, 44 Barb., 618; *Eberle v. Mehrbach*, 55 N. Y., 682; *Miller v. Roessler*, 4 E. D. Smith, 234.)

(b) **Advertising.**—A contract for the publication of an advertisement held void under former statute (*Smith v. Wilcox*, 24 N. Y., 353), now permitted by the Laws of 1871, ch. 702.

(c) **Hiring a horse.**—A contract for the hiring of a horse to be used on Sunday for pleasure cannot be enforced. (*Nodine v. Doherty*, 36 Barb., 59.)

But the hirer is liable to an action for negligence, though the contract was made on Sunday. (*Harrison v. Marshall*, 4 E. D. Smith, 271.)

§ 268. **Serving process.**—All service of legal process of any kind whatever, upon the first day of the week, is prohibited, except in cases of breach of the peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or except where such service is specially authorized by statute.

2. R. S., 928, § 88.

(a) **Process cannot be legally issued or served on Sunday.** (*Van Vechten v. Paddock*, 12 Johns., 178; *Butler v. Kelsey*, 15 Johns., 177.)

(b) **Nor be made returnable.**—*Gould v. Spencer*, 5 Paige, 541; *Arctic F. Ins. Co. v. Hicks*, 7 Abb., 204.

When so served proceedings will be set aside. (*Robb v. Moffatt*, 3 Johns., 257.)

(c) **Admission of service.**—A defendant cannot legally admit service of process on Sunday. (*Wood v. Brooklyn*, 14 Barb., 425.)

An arrest cannot be made on Sunday for the violation of a municipal ordinance. (*Wood v. Brooklyn*, 14 Barb., 425.)

Service of notice of motion on Sunday is irregular and void. (*Field v. Park*, 20 Johns., 140.)

An award made and published on Sunday is void. (*Story v. Elliott*, 8 Cow., 27.)

§ 269. **Punishment of Sabbath breaking.**—Sabbath breaking is a misdemeanor, punishable by a fine not less than one dollar and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both.

Laws 1872, ch. 590, § 4.

§ 270. **Forfeiture of commodities exposed for sale.**—In addition to the penalty imposed by the last section, all com-

modities exposed for sale on the first day of the week in violation of the provisions of this chapter, shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or a mayor, recorder or alderman of a city, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseers of the poor for the use of the poor of the town or city.

2 R. S., 929, § 85.

§ 271. Remedy for maliciously serving process. — Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

2 R. S., 929, §§ 88, 89; Laws 1847, ch. 849, § 2; see, also, *Maxson v. Annas*, 1 Den., 204.

§ 272. Compelling adoption of a form of belief. — An attempt, by means of threats or violence, to compel any person to adopt, practice or profess a particular form of religious belief, is a misdemeanor.

New. (See U. S. Const., first amendment; N. Y. State Const., art. I, § 3.)

§ 273. Preventing performance of a religious act. — A person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

1 R. S., 674, § 64.

§ 274. Disturbing religious meetings. — A person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts enumerated in the next section, is guilty of a misdemeanor.

1 R. S., 674, § 64; 2 R. L., 194, § 4; Laws 1829, p. 374, §§ 448, 650; 2 R. S., 927, § 76.

(a) **Disturbers may be removed.** — A person who disturbs divine worship may be removed by the use of force sufficient for that purpose. (*Wall v. Lee*, 34 N. Y., 141.)

(b) **Power of church officers.**—The officers of a religious corporation have power to remove disturbers, etc. (*Beckett v. Lawrence*, 7 Abb. [N. S.], 403.)

(c) **Invalid regulation.**—A regulation prohibiting a person from leaving a church during divine service is not valid. (*People v. Brown*, 1 Wh. Cr. Cas., 124.)

(d) **Indictable at common law.**—The offense of disturbing public divine service was indictable at common law as well as under 1 R. S., 674, § 64. (*People v. Crowley*, 23 Hun, 412; see, also, *People v. Degey*, 2 Wh. Cr. C., 135; *State v. Smith*, 5 Harring., 490; *State v. Lenkaw*, 69 N. C., 214; *State v. Jasper*, 4 Dev., 323; see, also, *First Bap. Ch. v. Utica and Schen. R. R. Co.*, 6 Barb., 319; 5 Barb., 79.)

§ 275. **Definition of offense.**—The following acts, or any of them, constitute disturbance of a religious meeting:

1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting;

2. Engaging in, or promoting, within two miles of the place where a religious meeting is held, any racing of animals or gaming of any description;

3. Obstructing in any manner without authority of law, within the like distance, free passage along a highway to the place of such meeting.

2 R. S., 927, § 76; 1 R. S., 674, § 64; 2 R. L., 194, § 4; Laws 1824, p. 374; Laws 1872, ch. 590, § 3.

§ 276. **Processions and parades.**—All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead, and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fire-works, discharge of cannon or fire-arms, or other disturbing noise. At a military funeral, however, music may be played while escorting the body, but not within one block of a place of worship where service is then celebrated.

A person willfully violating any provision of this section is punishable by fine not exceeding twenty dollars, or imprisonment not exceeding ten days, or by both.

2 R. S., 930, §§ 93, 94; Laws 1880, ch. 42; Laws 1872, ch. 590, §§ 3, 4.

§ 277. **Theatrical and other performances.**—The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy,

negro or other dancing, or any other entertainment of the stage, or any part or parts therein, or any circus, equestrian or dramatic performance, or any performance of jugglers, acrobats or rope-dancers, on the first day of the week, is forbidden; and every person aiding in such exhibition, by advertisement or otherwise, and every owner or lessee of any garden, building or other room or place, who leases or lets the same for the purpose of any such exhibition or performance, or who assents to the use of the same for any such purpose, if it be used, is guilty of a misdemeanor.

In addition to the punishment therefor provided by statute, every person violating this section is subject to a penalty of five hundred dollars; which penalty "The Society for the Reformation of Juvenile Delinquents," in the city of New York, for the use of that society, and the overseers of the poor in any other city or town, for the use of the poor, are authorized in the name of the people of this state, to recover. Besides this penalty, every such exhibition or performance, of itself, annuls any license which may have been previously obtained by the manager, owner or lessee, using or letting such building, garden, room or place, or consenting to such exhibition or performance.

2 R. S., 980, §§ 95, 96; Laws 1860, ch. 501.

An agreement to make an ascension in a balloon on Sunday from a public garden is within the statute. (*Brunnett v. Clark*, 1 Sheld., 500.)

CHAPTER II.

RAPE, ABDUCTION CARNAL ABUSE OF CHILDREN AND SEDUCTION.

SECTION 278. Rape defined.

279. When physical ability must be proved.

280. Penetration sufficient.

281. Compelling woman to marry.

282. Abduction.

283. No conviction on certain testimony.

284. Seduction under promise of marriage.

285. Subsequent marriage.

286. No conviction on certain testimony.

§ 278. (Amended 1882.) **Rape defined.** — Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent. A person perpetrating such an act, or an act of sexual intercourse with a female not his wife,

1. When the female is under the age of ten years; or,
2. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or,
3. When her resistance is forcibly overcome; or,
4. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or,
5. When her resistance is prevented by stupor or by weakness of mind produced by an intoxicating narcotic, or anesthetic agent, administered by, or with the privity of, the defendant; or,
6. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant, is punishable by imprisonment for not less than five nor more than twenty years.

3 R. S., 935, §§ 27, 28, 29; 2 R. S. (Edm.), 683, § 22.

(a) **A boy under the age of fourteen years** is *prima facie* incapable of committing rape. (*People v. Randolph*, 2 Park., 174.)

Nor can he be convicted of assault with intent to commit rape. (*Id.*)

The law raises no definite period to raise the inference of puberty. (*People v. Croucher*, 2 Wh. Cr. C., 42.)

(b) **The crime of incest** is merged in that of rape. (*People v. Harriden*, 1 Park., 344.)

(c) **Word ravish necessary.**—The word ravish is indispensable in charging the crime of rape. (*Gougleman v. People*, 3 Park., 15.)

(d) **Deception and fraud.**—To have carnal knowledge with a woman under circumstances that lead her to believe it is her husband, is rape. (*Gordon's case*, 3 C. H. Rec., 91; *People v. Barlow*, 1 Wh. Cr. C., 378; see *People v. Quinn*, 50 Barb., 128; *Waller v. People*, *Id.*, 144.)

Illicit intercourse obtained by fraud not rape, unless it appeared that force would have been used if necessary. (*Waller v. People*, 50 Barb., 144.)

(e) **Intoxicated person.**—Sexual intercourse with an intoxicated woman not rape. (*People v. Quinn*, 50 Barb., 128.)

(f) **Felonious assault.**—There can be no conviction for a felonious assault upon a woman if she consent to the criminal connection. (*People v. Bransby*, 32 N. Y., 525.)

(g) **Reluctance and resistance.**—To warrant conviction, there must be evidence of the utmost reluctance and resistance on the part of the prosecutrix. (*People v. Morrison*, 1 Park., 625.) And a request so to charge the jury is proper. (*People v. Monnais*, 17 Abb., 345; *Smith v. Fingar*, 1 Alb. L. J., 101.)

A defendant may be convicted of an attempt to commit a rape upon a child of seven years; it is presumed to be without consent. (*People v. Stamford*, 2 Wh. Cr. C., 152.)

(h) **Testimony of assaulted party.**—On a trial for an assault with intent to commit rape, the testimony of the party assaulted is not indispensable. (*People v. Bates*, 2 Park., 27.)

(i) **Declarations.**—On the trial of an indictment for rape the declarations of the female injured, or made immediately after the occurrence, are not evidence unless he be first impeached. (*People v. McGee*, 1 Den., 19.)

The fact that she made complaint immediately is evidence, but not the particulars of the same. (*Baccio v. People*, 41 N. Y., 265.)

(j) **Concealment, etc.**—If she conceals the fact for any considerable time, except through fear, it raises a presumption against her. (*Higgins v. People*, 1 Hun, 807.)

The prosecutrix may be asked whether the act was by her consent or against her will. (*Woodin v. People*, 1 Park., 464.)

(k) **Unchastity, etc.**—She may be asked whether she had had previous connection with other men. (*People v. Abbott*, 19 Wend., 192; *contra*, *People v. Jackson*, 3 Park., 391; *Crossman v. Bradley*, 53 Barb., 125.)

Evidence is admissible to show that the prosecutrix was in the habit of receiving men at her dwelling for the purpose of promiscuous intercourse. (*Woods v. People*, 55 N. Y., 515.)

Evidence of unchastity on part of prosecutrix is admissible if confined to her own neighborhood. (*Conkey v. People*, 1 Abb. Dec., 418; 5 Park., 81.)

(l) **Lasciviousness, etc.**—Defendant may also show acts of lasciviousness on part of prosecutrix tending to negative the want of consent. (*Crossman v. Bradley*, 53 Barb., 125.)

(m) **Acquittal a bar.**—An acquittal on a charge of rape is a bar to a subsequent indictment for assault with intent to commit rape. (*Sargeant's case*, 2 C. H. Rec., 44.)

(n) **Resistance, etc.**—In order to convict of a crime of rape on a female over the age of ten years, who was conscious, in the possession of her natural and physical powers, not overcome by numbers or terrified by threats, nor in such place or position that resistance would have been useless, it must appear that she did resist to the extent of her ability under the circumstances. (*People v. Dohring*, 59 N. Y., 374.)

(o) **Under age of ten years.**—Child cannot give consent so as to bar an indictment. (*Singer v. People*, 18 Hun, 418; *People v. Slawford*, 2 Whar. Cr. Cas., 152; *Stephens v. State*, 11 Ga., 225; *State v. Farmer*, 4 Ire., 224.)

(p) **Child under twelve.**—To sustain conviction for indecent assault on a child under twelve years, resistance on her part need not be shown. (*People v. Court Special Sess.*, 18 Hun, 330.)

(q) **Immorality of character.**—Evidence of general immoral character of prosecutrix may be shown. (*Brennan v. People*, 7 Hun, 171.)

And if, on cross-examination, she deny having had carnal intercourse with other men, she may be contradicted by other witnesses. (*Id.*)

§ 279. **When physical ability must be proved.**—No conviction for rape can be had against one who was under the age of fourteen years, at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt.

New.

A boy under the age of fourteen years is *prima facie* incapable of com-

mitting a rape, to overcome which there must be clear proof of capacity by affirmative evidence. (*People v. Randolph*, 2 Park., 174.)

Nor can he be convicted of an assault with intent to commit rape. (*Id.*, 174, 213; see, also, *People v. Croucher*, 2 Whar. Cr. Cas., 42; 1 Hale, 618; *R. v. Eldershaw*, 3 C. & P., 394; *State v. Law*, Winslow's N. C., 300; *Stephen v. State*, 11 Ga., 225; *Com. v. Green*, 2 Pick., 380.)

§ 280. **Penetration sufficient.** — Any sexual penetration, however slight, is sufficient to complete the crime.

3 R. S., 1030, § 23; 2 R. S. (Edm.), 760, § 18; *Williams v. State*, 14 Ohio, 22; *Blackburn v. State*, 22 Ohio St., 102.

§ 281. **Compelling woman to marry.**— A person who by force, menace or duress, compels a woman against her will to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment for not less than three nor more than ten years, or by a fine of not more than one thousand dollars, or by both.

3 R. S., 935, § 29; 2 R. S. (Edm.), 683, §§ 24, 25; 1 R. L., 156, § 2; Laws 1843, ch. 105.

Illicit intercourse obtained by fraud, without force or the intent to use force, is not rape. (*Walter v. People*, 50 Barb., 144; see, also, *Gordon's case*, 3 C. H. Rec., 91; *People v. Barlow*, 1 Whar. Cr. Cas., 378; also *People v. Quinn*, 50 Barb., 128.)

§ 282. **Abduction.**— A person who,

1. Takes a female under the age of sixteen years, without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage, prostitution or sexual intercourse; or,

2. Inveigles or entices an unmarried female under the age of twenty-five years, of previous chaste character, into a house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse; or,

3. Takes or detains a woman unlawfully against her will, with the intent to compel her, by force, menace, or duress, to marry him, or to marry any other person, or to be defiled;

Is guilty of abduction, and punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

3 R. S., 936, subd. 1, § 33; *Id.*, subd. 2, § 32, and subd. 3, § 30; 2 R. S. (Edm.), 693, § 26; Laws 1848, ch. 111.

(a) A mere attempt to abduct not enough. (*People v. Pearshall*, 6 Park., 129.)

(b) **Previous chastity.** — To sustain an indictment previous chastity must be shown; also that the abduction was for purposes of indiscriminate prostitution. (*Carpenter v. People*, 8 Barb., 603.)

(c) **Seduction and abduction.** — Seduction does not amount to abduction under the statute. (*People v. Pearshall*, 6 Park., 139.)

Where illicit intercourse is of long standing it does not constitute the crime. (*Safford v. People*, 1 Park., 474.)

(d) **Chastity, how shown.** — On the trial of an indictment inveigling, enticing or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for purposes of prostitution, the actual personal chastity of the female must be shown; evidence of her general reputation for chastity is not admissible. (*Kaufman v. People*, 11 Hun, 83; see *People v. Kane*, 14 Abb., 15.)

The prosecutrix character can only be impeached by specific acts of lewdness, and not by general reputation. (*Crozier v. People*, 1 Park., 453; *People v. Kenyon*, 5 id., 254; *People v. Kane*, 15 Abb., 15; *Conkey v. People*, 1 Abb. Dec., 418; 5 Park., 31.)

§ 283. **No conviction on certain testimony.** — No conviction can be had for abduction, compulsory marriage, or defilement, upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence.

3 R. S., 936, § 82; Laws 1848, p. 118, ch. 105; Id., p. 148, ch. 111.

(a) **Corroboration required.** — To warrant conviction for seduction the oath of prosecutrix must be corroborated both as to seduction and promise of marriage. (8 N. Y. Leg. Obs., 189.)

The corroboration must relate to the intercourse and promise of marriage; not to her chastity or being unmarried. (*People v. Kenyon*, 5 Park., 254; *Armstrong v. People*, 7 N. Y., 38.)

The corroborative evidence need not be positive in its character; circumstantial evidence sufficient. (*Boyce v. People*, 55 N. Y., 644; *Crozier v. People*, 1 Park., 453; *People v. Kenyon*, 5 id., 254; *People v. Lomax*, 6 Abb., 139.)

(b) **Question of fact.** — Whether prosecutrix has been corroborated or not is a question for the jury. (*Orandall v. People*, 2 Lana., 309.)

§ 284. **Seduction under promise of marriage.** — A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

3 R. S., 936, § 31; Laws 1846, ch. 111.

(a) **Conditional promise.** — If the defendant effected his object by a conditional promise that if the prosecutrix would permit illicit connection he would marry her, he may be convicted of seduction. (*Kenyon v. People*, 26 N. Y., 203; 5 Park., 254; *Boyce v. People*, 55 N. Y., 644.)

(b) **Defendant a married man.** — If the prosecutrix have knowledge that

the defendant was a married man at time of the alleged seduction, it is a good defense. (*People v. Alger*, 1 Park., 833.)

(c) **An illicit intercourse of long continuance not seduction.** (*Safford v. People*, 1 Park., 474.)

(d) **A mutual promise of marriage on part of complainant is implied.** (*People v. Kenyon*, 5 Park., 254; *People v. Kune*, 14 Abb., 15.)

(e) **Promise need not be valid.**—Or defendant of full age; age of puberty sufficient. (*Crozier v. People*, 1 Park., 453; *People v. Kenyon*, 5 Park., 254; *State v. Pierce*, 27 Conn., 819.)

(f) **Pregnancy not essential to conviction.** (*Cook v. People*, 2 S. C., 404.)

(g) **Proof of unchastity.**—The prosecutrix previous chastity can only be impeached by specific acts of lewdness, not by general reputation. (*Crozier v. People*, 1 Park., 453; *People v. Kenyon*, 5 id., 254; *People v. McArdle*, 5 id., 180; *Boyce v. People*, 55 N. Y., 644; *Carpenter v. People*, 8 Barb., 608; *Kaufman v. People*, 11 Hun, 82.)

(h) **Previous chaste conduct will be presumed.** (*People v. Kane*, 14 Abb., 15; *Conkey v. People*, 5 Park., 431; *Orandall v. People*, 3 Lans., 809; see, also, on subject generally, *Andre v. State*, 5 Clarke, 389; *Boak v. State*, Id., 4.0; *Wood v. State*, 48 Ga., 192.)

§ 285. **Subsequent marriage.**—The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

3 R. S., 936, § 31; Laws 1848, ch. 111.

(a) **Offer of marriage.**—In an action for seduction, defendant can't prove subsequent offer of marriage in mitigation of damages. (*Ingersoll v. Jones*, 5 Barb., 661.)

Where the illicit intercourse has continued for several years, it was held not to be seduction within the statute. (*Safford v. People*, 1 Park., 474; see *People v. Milepough*, 11 Mich., 278.)

§ 286. **No conviction on certain testimony.**—No conviction can be had for the offense specified in section two hundred and eighty-four, upon the testimony of the female seduced, unsupported by other evidence.

3 R. S., 936, § 31; Laws 1848, ch. 111.

(a) **Corroboration.**—The oath of the prosecutrix must be corroborated both as to the seduction and promise of marriage. (*People v. Hine*, 8 N. Y. Leg. Obs., 139; *Armstrong v. People*, 70 N. Y., 38.)

And not as to chastity and being unmarried. (*People v. Kenyon*, 5 Park., 254; *Armstrong v. People*, 70 N. Y., 38.)

(b) **Need not be positive.**—The corroborative testimony need not be positive; may be circumstantial. (*Boyce v. People*, 55 N. Y., 644; *Crozier v. People*, 1 Park., 453; *People v. Kenyon*, 5 id., 254; *People v. Lomax*, 6 Abb., 189.)

(c) **Question of fact.**—As to whether prosecutrix has been corroborated or not is a question for the jury. (*Orandall v. People*, 3 Lans., 809.)

CHAPTER III.

ABANDONMENT AND OTHER ACTS OF CRUELTY TO CHILDREN.

- SECTION 287. Abandonment of child under six years.
 288. Unlawfully omitting to provide for child.
 289. Endangering life or health of child.
 290. Keepers of concert saloons, etc.
 291. Children not to beg, etc.
 292. Certain employment of a child.
 293. Duty of officers of society.

§ 287. **Abandonment of child under six years.**—A parent, or other person having the care or custody, for nurture or education, of a child under the age of six years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a state prison, for not more than seven years, or in a county jail for not more than one year.

3 R. S., 936, § 35; 2 R. S. (Edm.), § 35.

(a) **At common law.**—*Ree v. O'handler*, 1 Jur. (N. S.), 429; *Ree v. Gray*, 7 Cox Cr. Cas., 826; *Ree v. S.*, 5 id., 279; *Ree v. Philpot*, 6 id., 140; *State v. Ruhl*, 8 La., 447.

§ 288. **Unlawfully omitting to provide for child.**—A person who willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter, or medical attendance to a minor, is guilty of a misdemeanor.

2 R. S., 808, § 1; Laws 1876, ch. 122, § 4; 1 R. L., § 21; Laws 1881, p. 114, § 4.

(a) **Parent bound to support children.**—A parent is bound to support his infant children with necessities, etc. (*Van Valkenburgh v. Watson*, 18 Johns., 480; *Chilcott v. Trimble*, 18 Barb., 503; *Cromwell v. Benjamin*, 41 id., 558.)

A father is not liable for articles furnished his minor child without proof that they were necessary and proper for his station in life. (*Clinton v. Rowland*, 24 id., 634.)

(b) **Husband.**—A husband not bound to support his wife's child by a former marriage. (*Gay v. Ballou*, 4 Wend., 403.)

One failing to supply a child under his care with proper food is guilty of an offense. (*Crowley v. People*, 21 Hun, 413; 83 N. Y., 484.)

(c) **Mother.**—After the death of the father a mother is liable for the support of an indigent child under the statute. (*Furman v. Van Sice*, 56 N. Y., 435.)

§ 289. **Endangering life or health of child.**—A person who, having the care or custody of a minor, either

1. Willfully causes or permits the minor's life to be endan-

gered, or its health to be injured, or its morals to become depraved; or,

2. Willfully causes or permits the minor to be placed in such a situation, or to engage in such an occupation, that its life is endangered, or its health is likely to be injured, or its morals likely to be impaired;

Is guilty of a misdemeanor.

Laws 1876, ch. 122, § 4.

A person who neglects or refuses to properly provide for a child under his charge is guilty of a misdemeanor. (*Crowley v. People*, 21 Hun, 415; 11 N. Y. W. Dig., 516; 82 N. Y., 464.)

Where a person has the actual, immediate physical care and custody of a child, and willfully permits its health to be injured, he is within the purview of the statute, although in so doing he is acting as an officer of a benevolent corporation. (11 N. Y. W. Dig., 516; 83 N. Y., 464.)

§ 290. **Keepers of concert saloons, etc.**—A person who admits to, or allows to remain in any dance-house, concert saloon, theater, or other place of entertainment, owned, kept or managed by him, where wines or spirituous or malt liquors are sold or given away, any child, actually or apparently under the age of fourteen years, unless accompanied by a parent or guardian, is guilty of a misdemeanor.

3 R. S., 982, § 94; Laws 1877, ch. 428.

§ 291. **Children not to beg, etc.**—A male child actually or apparently under the age of sixteen years, or a female child actually or apparently under the age of fourteen years, who is found:

1. Begging or receiving or soliciting alms, in any manner or under any pretense; or,

2. Not having any home or other place of abode or proper guardianship; or,

3. Destitute of means of support, and being either an orphan or living or having lived with or in custody of a parent or guardian who has been sentenced to imprisonment for crime, or who has been convicted of a crime against the person of such child, or has been adjudged an habitual criminal; or,

4. Frequenting the company of reputed thieves or prostitutes, or a house of prostitution or assignation, or living in such a house either with or without its parent or guardian, or frequenting concert saloons, dance-houses, theaters or other places of enter-

tainment, or places where wines, malt or spirituous liquors are sold, without being in charge of its parent or guardian ; or,

5. Coming within any of the descriptions of children mentioned in section two hundred and ninety-two, must be arrested and brought before a proper court or magistrate, as a vagrant, disorderly, or destitute child. Such court or magistrate may commit the child to any charitable, reformatory or other institution authorized by law to receive and take charge of minors, or may make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers, or disorderly persons.

Laws 1821, p. 182, § 3; Laws 1824, p. 384, § 4; Laws 1878, ch. 428; Code Cr. Proc., § 893.

Where a cripple simply holds out his hands and receives money from those passing, without saying a word, he comes within the statute prohibiting beggary, etc. (*Ex parte, Hallen*, 12 Hun, 131.)

§ 292. **Certain employment of a child.**— A person who employs or causes to be employed, or who exhibits, uses, or has in custody for the purpose of exhibiting or employing, a female child apparently or actually under the age of fourteen years, or a male child apparently or actually under the age of sixteen years, or who having the care, custody or control of such a child as parent, relative, guardian, employer or otherwise, sells, lets out, gives away or in any way procures or consents to the employment or exhibition of such a child, either

1. As a rope or wire walker, dancer, gymnast, contortionist, rider or acrobat ; or,

2. In begging or receiving alms, or in any mendicant occupation ; or,

3. In peddling, singing or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation ; or,

4. In any indecent or immoral exhibition or practice ; or,

5. In any practice or exhibition dangerous or injurious to the life, limb, health or morals of the child ;

Is guilty of a misdemeanor. But this section does not apply to the employment of any child as a singer or musician in a church, school, or academy, or in teaching or learning the science or practice of music, or as a musician in any concert with the written consent of the mayor of the city, or the president of the board of trustees of the village where such concert takes place.

Laws 1878, ch. 122, §§ 1, 2.

§ 293. **Duty of officers of society.**—A constable or police officer must, and any agent or officer of any incorporated society for the prevention of cruelty to children may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this chapter, and any minor coming within any of the descriptions of children mentioned in section two hundred and ninety-one or in section two hundred and ninety-two.

Such constable, police officer or agent may interfere to prevent the perpetration in his presence of any act forbidden by this chapter.

A person who obstructs or interferes with any officer or agent of such society in the exercise of his authority under this chapter, is guilty of a misdemeanor.

Laws 1876, ch. 123, §§ 1, 2.

CHAPTER IV.

ABORTION AND CONCEALING DEATH OF INFANT.

SECTION 294. Abortion defined.

295. Killing of child in attempting miscarriage.

296. Concealing birth.

297. Selling drugs, etc.

§ 294. **Abortion defined.**—A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child of which she is pregnant, either

1. Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug or substance; or,

2. Uses, or causes to be used, any instrument or other means;

Is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.

3 R. S., 932, §§ 9, 10, 11; Laws 1871, ch. 181, § 1; Laws 1880, ch. 283, § 1; § 191, *ante*, § 318, *post*.

(*a*) **At common law.**—1 Russ. on Cr. L., 671; 1 Wharton's Cr. Law, § 592; 1 East P. C., 90; *Com. v. Wood*, 11 Gray, 86; *Com. v. Brown*, 14 id., 419; *Wilson v. State*, 22 Ohio R., 819.

(b) **Indictment.**—As to sufficiency of indictment under this statute. (*People v. Lohman, alias Madame Restell*, 2 Barb., 216.)

It is a misdemeanor to administer drugs, etc., to a pregnant female with intent to produce a miscarriage. (*People v. Lohman*, 1 N. Y., 379, 383; 2 Barb., 218.)

(c) **Advising the use of drugs.**—Where a party advises a pregnant woman to take drugs to procure a miscarriage, or administer the same, the female is not regarded as an accomplice, but rather as a victim. (*Dunn v. People*, 29 N. Y., 523.)

(d) **Abortion.**—Under an indictment for producing abortion of a quick child, party may be convicted, though it turn out that the child was not quick. (*People v. Jackson*, 3 Hill, 92.)

The willful killing of an unborn child is not manslaughter, except as made so by statute. (*Evans v. People*, 49 N. Y., 86.)

What is a sufficient indictment under the statute. (*People v. Davis*, 56 N. Y., 95, 101; see, also, *Monegan v. People*, 55 N. Y., 613.)

Medicine need not be taken. (*State v. Murphy*, 3 Dutch., 112.) Nor need the prisoner be present if it has been taken. (*Reg. v. Wilson*, 1 Dears. & B., 127; *State v. Howard*, 32 Vt., 880; *Watson v. State*, 22 Alb. L. J., 318.)

(e) **Medicine and instrument.**—Where an indictment charged that the accused had administered to a married woman a certain drug and medicine, and had used and employed upon her body a certain instrument, with intent to procure a miscarriage, held sufficient averment under the statute. (*People v. Stockham*, 1 Park., 427; see, also, *Hunt v. People*, 3 id., 569.)

§ 295. Killing of child in attempting miscarriage.—A pregnant woman, who takes any medicine, drug or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years.

3 R. S., 932, § 10; Laws 1871, ch. 181, § 2; Laws 1872, ch. 181.

Any pregnant woman who shall take any medicine or drug for the purpose of procuring a miscarriage, is guilty of a criminal offense. (*Fraser v. People*, 54 Barb., 307.)

An accused person must show the necessity of using an instrument in order to save life, etc. (*Bradford v. People*, 20 Hun, 309.)

In an indictment under this statute, the words "a woman with child," is equivalent to "pregnant woman." (*Eckhardt v. People*, 23 Hun, 525; see, also, cases cited under § 294, *ante*.)

§ 296. Concealing birth.—A person who endeavors to conceal the birth of a child, by any disposition of the dead body of the child, whether the child died before or after its birth, is guilty of a misdemeanor.

§ 297. **Selling drugs, etc.**—A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony.

3 R. S., 933, § 11; Laws 1871, ch. 181, § 4; see § 191, *ante*, and §§ 818, 831, *post*.

CHAPTER V.

BIGAMY, INCEST AND THE CRIME AGAINST NATURE.

SECTION 298. Bigamy defined; how punished.

299. Exceptions.

300. Indictment for bigamy.

301. Punishment of consort.

302. Incest.

303. Crime against nature.

304. Penetration sufficient.

§ 298. **Bigamy defined; how punished.**—A person who, having a husband or wife living, marries another person, is guilty of bigamy, and is punishable by imprisonment in a penitentiary or state prison for not more than five years.

3 R. S., 964, § 13; 2 R. S. (Edm.), 709, §§ 8, 9.

(a) **Marriage must be within the State.**—Bigamy is not punishable within this state unless the second marriage took place within its territorial jurisdiction. (*People v. Mosher*, 2 Park., 195; *McReynolds v. State*, 5 Cold. [Tenn.], 18.)

(b) **Where wife remarries.**—If a man on his return from a long journey find his wife married to another, it is, nevertheless, bigamy for him to marry again. (*Van Pell's case*, 1 C. H. Rec., 137.)

(c) **After divorce.**—Not bigamy for a guilty party to remarry after divorce. (*People v. Hovey*, 5 Barb., 117.)

(d) **Marriage must be proved.**—In a prosecution for bigamy former marriage must be proved. (*Steer's case*, 2 C. H. Rec., 111; *Coleman's case*, 6 id., 3; *Phelan's case*, Id., 91; *People v. Whigham*, 1 Wh. C. C., 115.)

(e) **Defendant's confession not sufficient proof of first marriage.** (*People v. Humphrey*, 7 Johns., 314.)

(f) **What is sufficient marriage.**—Need not be a valid one. (*Hayes v. People*, 29 N. Y., 390; 5 Park., 325; 15 Abb., 163.)

(g) **Void first marriage.**—Where defendant claims that his first marriage was void because the woman was at the time the wife of another, he must prove that there was a prior valid subsisting marriage. (*Phelan's case*, 3 C. H. Rec., 91.)

(h) **A subsequent divorce.** — A subsequent divorce from the first wife on the ground of prior adultery is no defense. (*Baker v. People*, 2 Hill, 325; *Flemming v. People*, 27 N. Y., 329; *Gallaghan v. People*, 1 Park., 378.)

(i) **Evidence of barbarous treatment no defense.** — *Walworth's case*, 1 C. H. Rec., 171.

When prisoner put twice in jeopardy under an indictment for bigamy. (*Ah King v. People*, 5 Hun, 297.)

§ 299. **Exceptions.** — The last section does not extend,

1. To a person whose former husband or wife has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or,

2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by the judgment of a court of competent jurisdiction, for a cause other than his or her adultery; or,

3. To a person who being divorced for his or her adultery has received from the court which pronounced the divorce, permission to marry again; or,

4. To a person whose former husband or wife has been sentenced to imprisonment for life.

3 R. S., 964, § 14; 2 R. S. (Edm.), 709, § 9; 2 Kent's Com., 79, 81.

(a) **Foreign divorce no defense.** — An invalid foreign divorce is no defense to an indictment for bigamy committed within this State. (*People v. Baker*, 76 N. Y., 78; see, also, *People v. Mosher*, 9 Park., 195.)

(b) **Wife having remarried.** — If a man return from a long absence and find his wife married to another, he may not remarry. (*Van Pelt's case*, 1 C. H. Rec., 187; *Hull v. State*, 22 Alb. L. J. [Texas], 88.)

(c) **What constitutes void marriage "ab initio."** (*Phelan's case*, 6 C. H. Rec., 91.)

§ 300. **Indicting for bigamy.** — An indictment for bigamy may be found in the county in which the defendant is arrested, and the like proceedings, including the trial, judgment, and conviction, may be had in that county, as if the offense were committed therein.

3 R. S., 964, § 15; see § 376, *post*; *Houser v. People*, 46 Barb., 88; *Ah King v. People*, 5 Hun, 297.

Where a prisoner was convicted of bigamy in Oswego county, the prisoner not having committed the offense, nor been apprehended there; *held*, he must be discharged. (*Collins v. People*, 1 Hun, 610; 4 S. C., 77.)

§ 301. **Punishment of consort.** — A person who knowingly enters into a marriage with another, which is prohibited to the

latter by the foregoing provisions of this chapter, is punishable by imprisonment in a penitentiary or state prison, for not more than five years, or by a fine of not more than one thousand dollars, or both.

8 R. S., 964, § 16; 2 R. S. (Edm.), 710, § 11; *Boggins v. State*, 34 Ga., 275; *Arnold v. State*, 58 id., 574; 2 Whart. Crim. Law, §§ 1687, 1688; *Sauser v. People*, 8 Hun, 862.

§ 302. **Incest.**—When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.

8 R. S., 964, § 17; 2 R. S. (Edm.), 710, § 12; 2 Wharton's Crim. Law, § 1749; *U. S. v. Hiler*, 1 Morris, 830; *Com. v. Goodhue*, 2 Met., 193; *Howard v. State*, 11 Ohio, 328; *Cook v. State*, 11 Ga., 53; *People v. Murray*, 14 Cal., 159.

The crime of incest is merged in that of rape. (*People v. Harriden*, 1 Park C. C., 844; *Iowa v. Thomas*, 21 Alb. L. J., 496.)

§ 303. **Crime against nature.**—A person who commits the detestable and abominable crime against nature, with mankind or with a beast, or attempts sexual intercourse with a dead body, is punishable by imprisonment for not less than five, nor more than twenty years.

8 R. S., 966, § 25; 2 R. S. (Edm.), 711, § 20; 1 R. L., 408, § 8; 2 Whart. Crim. Law, § 579; *R. v. Jacobs*, R. R., 331; *Com. v. Snow*, 111 Mass., 411.

§ 304. **Penetration sufficient.**—Any sexual penetration, however slight, is sufficient to complete the crime specified in the last section.

8 R. S., 1030, § 23; 2 R. S. (Edm.), 760, § 18; *Williams v. State*, 14 Ohio, 222; *Blackburn v. State*, 22 Ohio St., 102; see, also, § 280, *ante*.

CHAPTER VI.

VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD.

SECTION 305. Right to direct disposal of one's own body after death.

- 306. Duty of burial.
- 307. Burial in other states.
- 308. Dissection when allowed.
- 309. Unlawful dissection a misdemeanor.
- 310. Remains after dissection must be buried.
- 311. Body stealing.
- 312. Recovering stolen body.
- 313. Opening grave.
- 314. Arresting or attaching a dead body.
- 315. Disturbing funerals.

§ 305. **Right to direct disposal of one's own body after death.**—A person has the right to direct the manner in which his body shall be disposed of after his death; and also to direct the manner in which any part of his body, which becomes separated therefrom during his lifetime, shall be disposed of; and the provisions of this chapter do not apply to any case where a person has given directions for the disposal of his body or any part thereof inconsistent with those provisions.

New. (See *Rousseau v. City of Troy*, 49 How., 492.)

It seems that the heir of a deceased person has the right of action where the monument or tomb of his ancestor is defaced, but he has no property in the body. (*Matter of the Brick Presb. Church, N. Y. City*, 3 Edw. Ch., 164; *Matter of Beekman street*, 4 Bradl., 508, 532.)

§ 306. **Duty of burial.**—Except in the cases in which a right to dissect it is expressly conferred by law, every dead body of a human being, lying within this state, must be decently buried within a reasonable time after death.

New. (*Matter of Brick Church, supra*; *Com. v. Loring*, 8 Pick., 320.)

§ 307. **Burial in other states.**—The last section does not impair any right to carry the dead body of a human being through this state, or to remove from this state the body of a person dying within it, for the purpose of burying the same elsewhere.

New in form. (Laws 1854, ch. 123, § 2.)

§ 308. **Dissection, when allowed.**—The right to dissect the dead body of a human being exists in the following cases:

1. In the cases prescribed by special statutes;

2. Whenever a coroner is authorized by law to hold an inquest upon the body, so far as such coroner authorizes dissection for the purposes of the inquest, and no further ;

3. Whenever and so far as the husband, wife or next of kin of the deceased, being charged by law with the duty of burial, may authorize dissection for the purpose of ascertaining the cause of death, and no further.

3 R. S., 1053, § 18; Laws 1854, ch. 123, § 1, amended.

§ 309. **Unlawful dissection a misdemeanor.** — A person who makes, or causes or procures to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor.

See Laws 1854, ch. 123, § 3.

§ 310. **Remains after dissection must be buried.** — In all cases in which a dissection has been made, the provisions of this chapter, requiring the burial of a dead body, and punishing interference with or injuries to it, apply equally to the remains of the body dissected, as soon as the lawful purposes of such dissection have been accomplished.

Laws 1854, ch. 123, § 1, in part.

§ 311. **Body stealing.** — A person who removes the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to sell the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years or by a fine not exceeding one thousand dollars, or both.

3 R. S., 965, § 18; 2 R. S. (Edm.), 710, § 18; Laws 1819, ch. 279, § 1; *Tate v. State*, 6 Blackf., 110.

§ 312. **Recovering stolen body.** — A person who purchases or receives, except for the purpose of burial, the dead body of a human being, or any part thereof, knowing that the same has been removed contrary to the last section, is punishable by imprisonment for not more than three years.

2 R. S., 965, § 19; 2 R. S. (Edm.), 710, § 14; Laws 1819, p. 279, § 1.

§ 313. **Opening grave.** — A person who opens a grave or other place of interment, temporary or otherwise, or a building wherein the dead body of a human being is deposited while awaiting burial, without authority of law, with intent to remove the body, or any part thereof, for the purpose of selling it or demanding money for the same, or for the purpose of dissection, or from malice or wantonness, or with intent to steal or remove the coffin or any part thereof, or anything attached thereto, or any vestment or other article interred, or intended to be interred with the dead body, is punishable by imprisonment for not more than two years, or by a fine of not more than two hundred and fifty dollars, or by both.

3 R. S., 965, § 20; 2 R. S. (Edm.), 710, § 15.

§ 314. **Arresting or attaching a dead body.** — A person who arrests or attaches the dead body of a human being upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

New.

§ 315. **Disturbing funerals.** — A person who, without authority of law, obstructs or detains any persons engaged in carrying or accompanying the dead body of a human being to a place of burial, is guilty of a misdemeanor.

New.

CHAPTER VII.

INDECENT EXPOSURES, OBSCENE EXHIBITIONS, BOOKS AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES..

SECTION 316. Exposure of person.

317. Possessing, etc., obscene prints.

318. Indecent articles, etc.

319. Mailing, carrying obscene prints, etc.

320. Warrant to sheriff to search, etc.

321. Physician's instruments.

322. Keeping disorderly houses, etc.

§ 316. **Exposure of person.** — A person who willfully and lewdly exposes his person, or the private parts thereof, in any

public place, or in any place where others are present, or procures another so to expose himself, is guilty of a misdemeanor.

New. Where the exposure took place in a room with doors and shutters closed, in presence of persons of opposite sex, it was held to be in a public place within the statute. (*People ex rel. Lee v. Bixby*, 4 Hun, 636.)

(a) **Intent.**—In a prosecution under the statute, the intent is the gravamen of the charge, and that is a question for the jury. (*Miller v. People*, 5 Barb., 203; *State v. Millard*, 18 Vt., 574.)

What constitutes indecent exposure. (*Com. v. Wardell* [Mass.], 19 Alb. L. J., 135; *Rez v. Sedley*, 10 St. Trials Ap., 93; *Rez v. Gallard*, 1 Sess. Cases, 231; *Moffatt v. State*, 49 Texas, 346; *Rez v. Furrell*, 9 Cox C. C., 446.)

§ 317. **Possessing, etc., obscene prints.**—A person who sells, lends, gives away or offers to give away, or shows, or has in his possession, with intent to sell or give away, or to show, or advertises or otherwise offers for loan, gift, sale or distribution, an obscene or indecent book, writing, paper, picture, drawing or photograph, or any article or instrument of indecent or immoral use, or who designs, copies, draws, photographs, or otherwise prepares such a book, picture, drawing or other article, or writes, or prints, or causes to be written or printed, a circular, advertisement, or notice of any kind, or gives information orally, stating when, where, how, or of whom, or by what means, such an indecent or obscene article or thing can be purchased or obtained, is guilty of a misdemeanor.

8 R. S., 979, §§ 77, 78; Laws 1872, ch. 747 § 1; Laws 1873, ch. 777, § 1; Laws 1878, ch. 205, § 297, *ante*; *Willis v. Warren*, 1 Hilt., 590.

§ 318. **Indecent articles, etc.**—A person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend or give away, or has in his possession, with intent to sell, lend or give away, or advertises or offers for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means, such an article or medicine can be purchased or obtained, or who manufactures any such article or medicine, is guilty of a misdemeanor.

8 R. S., 980, § 78; Laws 1872, ch. 747, § 1; Laws 1873, ch. 777, §§ 1, 2; *see ante*, § 297.

§ 319. **Mailing, carrying obscene print, etc.** — A person who deposits, or causes to be deposited, in any post-office within the state, or places in charge of an express company, or of a common carrier, or other person, for transportation, any of the articles or things specified in the last two sections, or any circular, book, pamphlet, advertisement, or notice relating thereto, with the intent of having the same conveyed by mail or express, or in any other manner, or who knowingly or willfully receives the same, with intent to carry or convey, or knowingly or willfully carries or conveys the same, by express, or in any other manner except in the United States mail, is guilty of a misdemeanor.

3 R. S., 980, § 82; Laws 1872, ch. 747, § 2.

§ 320. **Warrant to sheriff to search, etc.** — A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this chapter, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal or police officer within the county, directing him to search for, seize and take possession of any of the articles specified in this chapter, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon the conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had.

3 R. S., 980, § 83; Laws 1872, ch. 747, § 3; Laws 1873, ch. 777, § 4.

§ 321. **Physician's instruments.** — An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this chapter. The supplying of such articles to such physicians or by their direction, or prescription, is not an offense under this chapter.

3 R. S., 980, § 81; Laws 1873, ch. 777, § 5.

§ 322. **Keeping disorderly houses, etc.** — A person who keeps a house of ill-fame or assignation of any description, or a

house or place for persons to visit for unlawful sexual intercourse, or for any lewd, obscene, or indecent purpose, or a disorderly house, or any place of public resort by which the peace, comfort, or decency of a neighborhood is habitually disturbed, or who, as agent or owner, lets a building or any portion of a building, knowing that it is intended to be used for any purpose specified in this section, or who permits a building or a portion of a building to be so used, is guilty of a misdemeanor.

New in form.

Indictable at common law. (1 Russ. on Crimes, 322; see, also, § 385, subdivision 2, *post.*)

(a) **House of prostitution.**—One who demises a house, knowing that it is to be kept for purposes of prostitution, is punishable by indictment for a misdemeanor. (*People v. Erwin*, 4 Den., 129; *Lowenstein v. People*, 54 Barb., 299.)

A house of prostitution tends to corrupt and deprave public morals and disturb the public peace, and therefore is a common nuisance. (*Jacobowsky v. People*, 6 Hun, 524; 64 N. Y., 659; 1 Wharton Cr. L., § 2392; 1 Bish. Cr. L., §§ 665, 1046; *Warren v. People*, 3 Park., 544; *Lowenstein v. People*, 54 Barb., 299; *People v. Carey*, 4 Park., 238; 1 Sheld., 573.)

(b) **Indictment.**—In an indictment under this section it is not necessary to show that it actually disturbed the peace of the neighborhood, but only that it was a house of prostitution and openly kept as such. (*Barnesciotta v. People*, 10 Hun, 187; 69 N. Y., 612; *State v. Evans*, 5 Ired., 603.)

Any person concerned in the keeping of a house of prostitution is liable to indictment. (*Lowenstein v. People*, 54 Barb., 299; *Abrahams v. State*, 4 Ia., 541; 6 *id.*, 117.)

(c) **House of prostitution defined.**—What constitutes house of prostitution under the statute. (*King v. People*, 11 Week. Dig., 392.)

Not necessary that the immoral practices should be open to public observation. (*Id.*)

(d) **May be abated as nuisance.**—Though a house of ill-fame is a public and common nuisance, it may not be lawfully destroyed in abating it. (*Ely v. Sup. of Niagara*, 36 N. Y., 297; *Moody v. Supervisors*, 46 Barb., 659.)

CHAPTER VIII.

LOTTERIES.

SECTION 323. "Lottery" defined.

324. Lottery declared a public nuisance.

325. Contriving, drawing, etc., lottery.

326. Selling lottery tickets.

327. Advertising lotteries.

328. Offering property for disposal dependent upon the drawing of any lottery.

329. Keeping office, etc., for registry.

330. Insuring lottery tickets, etc.

331. Advertising offers to insure lottery tickets.

332. Property offered for disposal in lotteries, forfeited.

333. Letting building for lottery purposes.

334. Lotteries out of this state.

335. Advertisements by persons out of this state.

§ 323. "**Lottery**" defined. — A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle or gift enterprise, or by some other name.

2 R. S., 922, § 47; 1 R. L., 222, § 7.

(a) **Selling a chance.** — An agreement to pay five dollars in consideration of the receipt of a less sum if a particular number be drawn on a given day, is selling a chance of a ticket within the meaning of the act. (*Baldwin's case*, 3 C. H. Rec., 96; *Wilkinson v. Gill*, 10 Hun, 156.)

(b) **Distributing lots.** — An annual distribution by lot among the members of an art union, of works of art purchased by three subscriptions, is a lottery within the statute. (*Governors of Alms-house, etc., v. Am. Art Union*, 7 N. Y., 228; *Wooden v. Shekell*, 4 Zab., 789; *Bell v. State*, 5 Sneed, 507; *Chavannah v. State*, 49 Ala., 896; *Randle v. State*, 42 Texas, 580; *State v. Clarke*, 33 N. H., 329; *State v. Shorte*, 32 N. J., 398.)

(c) **Consideration determined by lot.** — Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery within the statute. (*Hull v. Ruggles*, 56 N. Y., 424; *Wilkinson v. Gill*, 10 Hun, 156; 74 N. Y., 63.)

(d) **Prize candy.** — Distribution of prize candy packages within the statute. (*Id.*)

What scheme amounts to a lottery. (*Kohn v. Koehler*, 21 Hun, 466.)

The scheme known as the Austrian government bond scheme is within the statute. (*Id.*)

§ 324. **Lottery declared a public nuisance.**—A lottery is unlawful and a public nuisance.

2 R. S., § 922, § 51; N. Y. State Const., art. I, § 10; § 365, *post*.

§ 325. **Contriving, drawing, etc., lottery.**—A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both.

2 R. S., § 922; §§ 47, 52; Laws 1819, p. 259, §§ 2, 3; N. Y. Const., art. I, § 10.

An indictment must describe the lottery as one set on foot for the purpose of disposing of property. (*People v. Payne*, 3 Den., 88.)

§ 326. **Selling lottery tickets.**—A person who sells, gives, or in any way whatever furnishes or transfers, to or for another, a ticket, chance, share or interest, or any paper, certificate or instrument, purporting to be or to represent a ticket, chance, share or interest, in or dependent upon the event of a lottery, to be drawn within or without of this state, is guilty of a misdemeanor.

2 R. S., § 923, § 54; Laws 1827, p. 329, § 6.

(a) **Lottery established in another State.**—The statute prohibits the sale of lottery tickets in this state, whether the lottery were established here or elsewhere. (*People v. Warner*, 4 Barb., 314.)

Lotteries authorized by the laws of another state are illegal here within the Revised Statutes. (*Grover v. Morris*, 73 N. Y., 473; *Kohn v. Koehler*, 21 Hun, 487.)

(b) **Indictment.**—What is a sufficient indictment for selling lottery tickets. (*People v. Warner*, 4 Barb., 314; *Garland's case*, 6 C. H. Rec., 98.)

Requisites of an indictment for setting on foot a lottery. (*People v. Taylor*, 3 Den., 91.)

An indictment for selling lottery tickets must describe the lottery as one set on foot for the purpose of disposing of property. (*People v. Payne*, 3 Den., 89.)

It need not set out the tickets sold, or give the names of purchasers if alleged to be unknown. (*People v. Taylor*, 3 Den., 99.)

(c) **Sale defined.**—What constitutes a sale defined. (*Wilkinson v. Gill*, 10 Hun, 156.)

§ 327. **Advertising lotteries.**—A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an account of a lottery, whether within or without the state, stating how, when or where the same is to be, or has been, drawn, or what are the prizes therein, or any of them, or

the price of a ticket, or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor.

2 R. S., 923, § 53; Laws 1819, p. 259, §§ 2, 3.

Publishing an account of a lottery to be drawn in another state is indictable under the statute. (*People v. Charles*, 3 Den., 212; 1 N. Y., 180.)

§ 328. Offering property for disposal dependent upon the drawing of any lottery. — A person who offers for sale or distribution, in any way, real or personal property, or any interest therein, to be determined by lot or chance, dependent upon the drawing of a lottery within or without this state, or who sells, furnishes or procures, or causes to be sold, furnished or procured, in any manner, a chance or share, or any interest in property offered for sale or distribution in violation of this chapter, or a ticket or other evidence of such a chance, share or interest, is guilty of a misdemeanor.

2 R. S., 923, § 55; Laws 1819, p. 260, §§ 6, 7.

The issuance of a lottery ticket is indictable under the statute, though the defendant acted for another, and had no interest therein. (*Kenney's case*, 3 C. H. Rec., 53; see, also, *Kull v. Ruggles*, 56 N. Y., 424; *Baldwin's case*, 3 C. H. Rec., 96; *Wilkinson v. Gill*, 10 Hun, 156; 74 N. Y., 473; *Grover v. Morris*, 73 N. Y., 473; *People v. Am. Art Union*, 7 N. Y., 240, all cited above.)

§ 329. Keeping office, etc., for registry. — A person who opens, sets up, or keeps, by himself or another person, an office or other place for registering the numbers of tickets in a lottery within or without this state, or for making, receiving or registering any bets or stakes for the drawing, or result of such a lottery, or who advertises or in any way publishes any account of an opening, setting up, or keeping of such an office or place, is guilty of a misdemeanor.

2 R. S., 924, § 59; Laws 1819, p. 260, § 6.

The keeping of a room for the sale of lottery tickets is not indictable as a common gaming-house. (*People v. Jackson*, 3 Den., 101.)

§ 330. Insuring lottery tickets, etc. — A person who insures, or receives any consideration for insuring, for or against the drawing of a ticket, share or interest in a lottery, or of a number of such a ticket, share or interest, or who receives any valuable consideration upon an agreement to pay money, or deliver property, in the event that a ticket, share or interest, or a number of such a ticket, share or interest in a lottery, shall prove fortunate or unfortunate, or shall be drawn or not drawn

in a particular way or in a particular order, or who promises or agrees, or offers to pay money, or to deliver property, or to do, or forbear to do, anything for the benefit of any person, with or without consideration, upon any accident or contingency dependent on the drawing thereof, or of any number or ticket therein, is guilty of a misdemeanor.

2 R. S., 924, §§ 60, 61; Laws 1819, p. 260, §§ 6, 7.

The insurance of a lottery ticket is indictable under the statute, though the insurer acted for another merely. (*Kenney's case*, 3 C. H. Rec., 53; *Baldwin's case*, Id., 96.)

§ 331. **Advertising offers to insure lottery tickets.** — A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an offer, notice or proposition, in violation of the last section, is guilty of a misdemeanor.

2 R. S., 924, § 61; Laws 1819, p. 260, § 7, in part; *People v. Charles*, 3 Den., 212; 1 N. Y., 180.)

§ 332. **Property offered for disposal in lotteries forfeited.** — All property offered for sale or distribution, in violation of the provisions of this chapter, is forfeited to the people of this state, as well before as after the determination of the chance on which the same was dependent. And it is the duty of the respective district attorneys to demand, sue for and recover, in behalf of the people, all property so forfeited, and to cause the same to be sold when recovered, and to pay the proceeds of the sale of such property, and any moneys that may be collected in any such suit, into the county treasury for the benefit of the poor.

2 R. S., 923, § 56; Laws 1827, p. 829, §§ 6, 12; see *People v. Am. Art Union*, 7 N. Y., 240; *Wilkinson v. Gill*, 10 Hun, 156; 74 N. Y., 63; *Grover v. Morris*, 73 N. Y., 473.

§ 333. **Letting building for lottery purposes.** — A person who lets, or permits to be used any building or portion of a building, knowing that it is intended to be used for any of the purposes declared punishable by this chapter, is guilty of a misdemeanor.

New. (See 1 R. S., 668, § 88; *People v. Jackson*, 3 Den., 101.)

§ 334. **Lotteries out of this state.** — The provisions of this chapter are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state

where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

New in form.

The statute prohibits the sale of lottery tickets within this state, whether to be drawn here or elsewhere. (*People v. Warner*, 4 Barb., 314; *Wilkinson v. Gill*, 10 Hun, 156; 74 N. Y., 68; *Grover v. Morris*, 78 N. Y., 473; *Kohn v. Koehler*, 21 Hun, 466.)

§ 335. **Advertisements by persons out of the state.**—The provisions of sections three hundred and twenty-seven and three hundred and thirty-one, are applicable, whenever the advertisement was published, or the letter or circular sent or delivered through or in this state, though the person causing or procuring the same to be published, sent or delivered, was out of the state at the time of so doing.

New. (*People v. Charles*, 8 Den., 212, cited above.)

CHAPTER IX.

GAMING.

SECTION 336. Keeping gambling apparatus in certain places.

337. Punishment.

338. Gambling apparatus declared a nuisance.

339. Winning at play by fraudulent means.

340. Exacting payment of money won at play.

341. Winning or losing upward of twenty-five dollars.

342. Witness' privilege.

343. Keeping gambling establishments.

344. Common gambler, etc.

345. Seizure of gambling implements authorized.

346. Such implements to be destroyed or delivered to district attorney.

347. Such implements to be destroyed upon conviction.

348. Persuading another person to visit gambling places.

349. Certain officers directed to prosecute offenses under this chapter.

350. Duty of masters to suppress gambling on board their vessels.

351. Bets, etc., on horse races, etc.

352. Racing of animals for stake.

§ 336. **Keeping gambling apparatus in certain places.**—It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of

chance, upon which money is usually wagered, at any of the following places:

1. Within a building, or the appurtenances or grounds connected with any building, in which a court of justice usually holds its sessions; or a building, any part of which is usually occupied by a religious corporation, or an incorporated benevolent, charitable, scientific or missionary society, or an incorporated academy, high school, college or other institution of learning, a library company, or building and mutual loan company;

2. Within any building, or the appurtenances connected with any building, while votes are received or canvassed therein at any election for an officer of this state, or of the United States, or while any public meeting is held therein;

3. Within the distance of one mile from the grounds upon which any training, review, drill or exercise of a military organization, created or permitted by the laws of this state, is proceeding, or upon which any public fair, exhibition, exercise or meeting is held in the open air; or,

4. Within any vessel lying in, or navigating, any of the waters of this state; or owned or navigated by, or for account of any corporation created by the laws of this state.

2 R. S., 917, § 22; Laws 1851, ch., 504, § 2; Laws 1858, ch. 214, § 275, *ante*.

(a) **Indictable at common law.**—(*Estes v. State*, 2 Humph., 496; *State v. Harris*, 30 Mo., 65; *Lord v. State*, 16 N. H., 325; *Com. v. Tilton*, 8 Met., 232.)

(b) **Nuisance.**—A public inn where any device for gambling is kept is a public nuisance. (*Butler's case*, 1 C. H. Rec., 66; *Cuscaden's case*, 2 id., 53.)

(c) **Occasional gambling.**—Occasional gambling is sufficient to characterize the place. (*Hitchens v. People*, 39 N. Y., 454.)

(d) **Billiard table.**—Playing the rub to see which of a party shall pay for the use of a billiard table is not gaming. (*People v. Sargeant*, 8 Cow., 139; *Tanner v. Albion*, 5 Hill, 121.)

A bond given by a tavern keeper under the act of 1837, prohibiting the keeping of "a gambling table of any description," is broken where a billiard table is kept for use in such tavern. (*People v. Harrison*, 28 How., 347; see, also, *State v. Leighton*, 3 Foster, 167.)

§ 337. **Punishment.**—A person who knowingly violates the last section is guilty of a misdemeanor.

2 R. S., 917, § 22; Laws 1851, p. 943; Id., ch. 504, §§ 1, 2; Laws 1855 ch. 214.

§ 338. **Gambling apparatus declared a nuisance.** — An article or apparatus maintained or kept in violation of section three hundred and thirty-six, is a public nuisance.

Laws 1851, ch. 504, § 2; Laws 1855, ch. 214; § 385, *post*; *State v. Hardin*, 1 Kan., 474.

§ 339. **Winning at play by fraudulent means.** — A person who by any fraud, or false pretense whatsoever, while playing at any game, or while having a share in any wager played for, or while betting on the sides or hands of such as play, wins or acquires to himself, or to any other, a sum of money or other valuable thing, is guilty of a misdemeanor.

2 R. S., 918, § 29; Code Cr. Proc., § 57.

§ 340. **Exacting payment of money won at play.** — A person who exacts or receives from another, directly or indirectly, any money or other valuable thing, by reason of the same having been won by playing at cards, faro, or any other game of chance, or any bet or wager whatever upon the hands or sides of players, forfeits five times the value of the money or thing so exacted or received, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

2 R. S., 918, § 30; 1 R. L. 185, § 5.

The right of action for money lost at gaming is assignable, and not a mere personal privilege of the loser. (*Meech v. Stoner*, 19 N. Y., 26.)

§ 341. **Winning or losing upward of twenty-five dollars.** — A person who wins or loses at play or by betting, at any time, the sum or value of twenty-five dollars or upwards, within the space of twenty-four hours, is punishable by a fine not less than five times the value or sum so lost or won, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

2 R. S., 919, § 31; 1 R. L., 158, § 2; Code Cr. Proc., § 57; *Arrieta v. Morrissey*, 1 Abb. (N. S.), 439; *Langworthy v. Broomley*, 29 How., 92.

§ 342. **Witness' privilege.** — No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony can-

not be received against him upon any criminal investigation or proceeding.

Id., §§ 36, 37; 1 R. L., 153, § 8; § 712, *post*.

§ 343. **Keeping gambling establishments.**—A person who keeps a room, shed, tenement, tent, booth, building, float or vessel, or any part thereof, to be used for gambling, or for any purpose, or in any manner forbidden by this chapter, or being the owner or agent, knowingly lets, or permits the same to be so used, is guilty of a misdemeanor.

2 R. S., § 40; Laws 1851, p. 943; Amended Laws 1851, ch. 504, § 1; Laws 1855, ch. 214.

(a) **Common law.**—The keeping of a common gaming-house is indictable at common law. (*People v. Jackson*, 3 Den., 101.)

(b) **Nuisance.**—A public house where gaming is permitted is a nuisance at common law. (*Butler's case*, 1 C. H. Rec., 66.)

(c) **Instruments.**—The keeping of gambling instruments in a house, and permitting others to use them, is indictable. (*Lyner's case*, 5 C. H. Rec., 156.)

(d) **Billiard tables.**—A billiard table may be a gaming table within the statute. (*People v. Harrison*, 28 How., 247.)

(e) **Shuffle board.**—A shuffle board kept in a grocery is within the statute. (*Cascadden's case*, 2 C. H. Rec., 53; *Lowrey v. State*, 1 Mo., 722.)

(f) **Habitual gambling.**—Habitual gambling not necessary. (*Hutchins v. People*, 39 N. Y., 454; *People v. Sargeant*, 8 Cow., 139; *Tanner v. Albion*, 5 Hill, 121.)

(g) **Common gaming-house.**—*Lord v. State*, 16 N. H., 325; *State v. Lindley*, 14 Ind., 490; *State v. Currier*, 23 Me., 43; *Com. v. Dean*, 1 Pick., 387; *Stevens v. People*, 67 Ill., 581.

§ 344. **Common gambler, etc.**—A person who is the owner, agent or superintendent of a place, or of any device or apparatus for gambling; or who hires, or allows to be used a room, table, establishment or apparatus for such a purpose; or who engages as dealer, game-keeper, or player in any gambling or banking game, where money or property is dependent upon the result; or who sells or offers to sell what are commonly called lottery policies, or any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who indorses or uses a book, or other document, for the purpose of enabling others to sell, or offer to sell, lottery policies, or other such writings, papers or documents, is a common gambler, and punishable by imprison-

ment for not more than two years, or by a fine not exceeding one thousand dollars, or both.

2 R. S., 919, § 41; Laws 1851, ch. 504, § 2; Laws 1855, ch. 214.

The keeping of gamblers' implements in a house, and permitting persons to play for small sums or for drink, is indictable. (*Lyner's case*, 5 C. H. Rec., 136; *McDaniel v. Com.*, 6 Bush [Ky.], 326.)

Under what conditions a gift enterprise may come within the statute. (*Bell v. State*, 5 Sneed, 507.)

A billiard table deemed a gaming table. (*People v. Harrison*, 28 How., 247.)

Cock fighting also prohibited under this section as construed in other states. (*Johnson v. State*, 4 Sneed, 614; *Bank v. State*, 7 Port., 453.)

Gambling with cards or dice. (*State v. Alberton*, 2 Blackf., 251; *State v. Smith*, 1 Meigs, 99; *Bagley v. State*, 1 Humph., 486.)

§ 345. Seizure of gambling implements authorized. —

A person, who is required or authorized to arrest any person for a violation of the provisions of this chapter, is also authorized and required to seize any table, cards, dice or other apparatus or article, suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken.

2 R. S., 919, §§ 42, 43; Laws 1851, ch. 504; Laws 1857, ch. 569.

A justice of the peace on arresting gamblers may also take into custody of the law the implements used in gambling, and detain them as evidence on the trial. (*Willis v. Warren*, 1 Hilt., 590; 17 How., 100.)

§ 346. Such implements to be destroyed or delivered to district attorney. —

The magistrate, to whom any thing suitable for gambling purposes is delivered pursuant to the last section, must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of this chapter; and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of this chapter, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.

2 R. S., 919, § 43; Laws 1851, ch. 504, § 3; Laws 1857, ch. 569.

Such implements to be destroyed after conviction. (*Willis v. Warren*, *supra*.)

§ 347. Such implements to be destroyed upon conviction. — Upon the conviction of the defendant, the district attorney

must cause to be destroyed every thing suitable for gambling purposes, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney.

Id., § 43; see, also, *Willis v. Warren*, *supra*.

§ 348. Persuading another person to visit gambling places. — A person who persuades another to visit any building or part of a building, or any vessel or float, occupied or used for the purpose of gambling, in consequence whereof such other person gambles therein, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to such other person in an amount equal to any money or property there lost by him at play, to be recovered in a civil action.

2 R. S., § 44; Laws 1851, ch. 504, § 5.

§ 349. Certain officers directed to prosecute offenses under this chapter. — It is the duty of all sheriffs, constables, police officers, and prosecuting or district attorneys, to inform against and prosecute all persons whom they have reason to believe offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding five hundred dollars.

R. S., § 45; Laws 1851, ch. 504, § 6.

§ 350. Duty of masters to suppress gambling on board their vessels. — If the commander, owner, or hirer of any vessel or float knowingly permits any gambling for money or property on board such vessel or float, or if he does not, upon his knowledge of the fact, immediately prevent the same, he is punishable by a fine not exceeding five hundred dollars; and, in addition thereto, is liable to any party losing money or property by means of gambling in violation of this section, in a sum equal to the money or property, to be recovered in a civil action.

R. S., § 46; Laws 1851, ch. 504, § 7.

§ 351. Bets, etc., on horse races, etc. — A person who keeps any room, shed, tenement, tent, booth or building, or any part thereof, or who occupies any place upon any public or private grounds within this state, with books, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of

selling pools, and any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election; or being the owner, lessee or occupant of any room, shed, tenement, tent, booth or building, or part thereof, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for hire or reward, of any money, property or thing of value staked, wagered or pledged upon any such result, is punishable by imprisonment for one year, or by fine not exceeding two thousand dollars, or both.

Laws 1877, ch. 178, § 1.

(a) **Wagers.** — At common law an action could be maintained on a wager. (*Bunn v. Riker*, 4 Johns., 126.)

(b) **Intent.** — It is the intent of the statute to prohibit every species of wager and bet. (*Ruckman v. Pitcher*, 1 N. Y., 392.)

(c) **Stakeholder.** — The stakeholder also liable. (*Ruckman v. Pitcher*, 1 N. Y., 392; *Storey v. Brennan*, 15 N. Y., 524; *Meech v. Stoner*, 19 N. Y., 26; *Mahoney v. O'Callahan*, 88 N. Y. Supr., 461; *Haywood v. Sheldon*, 18 Johns., 88; *Jordan v. Kent*, 44 How., 206; *Arnetta v. Morrissey*, 1 Abb. N. C., 446.)

§ 352. **Racing of animals for stake.** — All racing or trial of speed between horses or other animals for any bet, stake or reward, except such as is allowed by special laws, is a public nuisance; and every person acting or aiding therein, or making or being interested in any such bet, stake or reward, is guilty of a misdemeanor; and in addition to the penalty prescribed therefor, he forfeits to the people of this state, all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof.

2 R. S., 925, §§ 67, 72; 1 R. L., 222, §§ 1, 6.

(a) **Sweepstakes.** — A bet among several persons upon the event of a race of their horses, whereby the owner of the winner should take the sweepstakes, is illegal and void as a wagering contract. (*Gibbons v. Gouverneur*, 1 Den., 170.)

(b) **Race course established by law.** — The fact that a horse race is to take place on an authorized race course does not make a bet upon the race legal. (Id.; *Ruckman v. Bryan*, Id., 340; *Ruckman v. Pitcher*, 1 N. Y., 392.)

(e) **Bet defined.**—The words “bet or stakes” in the statute which prohibits all contests of speed of animals for bets or stakes, does not include contests of speed for prizes, purses or premiums as those terms are now commonly understood. (*Harris v. White*, 81 N. Y., 532.)

It is not, therefore, unlawful to trot or race horses for purses, prizes or premiums at any place where by statute it is authorized, or to contract to drive a horse at a trotting race at such a place. (*Id.*)

CHAPTER X.

PAWNBOOKERS.

SECTION 353. Pawnbroking without a license.

354. Refusing to exhibit stolen goods to owner.

355. Selling before time to redeem has expired and refusing to disclose particulars of sale.

§ 353. **Pawnbroking without a license.**—A person, who carries on the business of a pawnbroker, by receiving goods in pledge for loans at a rate of interest above that allowed by law, except by virtue of a license from a municipal corporation or other authority empowered to grant licenses from a municipal corporation or other authority empowered to grant licenses to pawnbrokers, is guilty of a misdemeanor.

2 R. S., 1006, § 8-18.

§ 354. **Refusing to exhibit stolen goods to owner.**—A pawnbroker, or person carrying on the business of a pawnbroker, or a junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, is guilty of a misdemeanor.

Id.

§ 355. **Selling before time to redeem has expired, and refusing to disclose particulars of sale.**—A pawnbroker who sells any article received by him in pledge, before the time to redeem the same has expired, or who willfully refuses to disclose the name of the purchaser, and the price received by him

for any article received by him in pledge, and subsequently sold, is guilty of a misdemeanor.

Id; see, also, Laws 1858, § 1, and § 573, *post*.

TITLE XI.

OF OTHER OFFENSES.

SECTION 356. Practice of medicine, etc., without license.

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- 377. Unlawful confinement of idiots, insane persons, etc.
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- 379. Reconfining persons discharged upon writ.
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- 381. Innkeepers and carriers refusing to receive guests and passengers.
- 382. Frauds on hotel keepers.
- 383. Protecting civil and public rights.
- 384. Acrobatic exhibitions.

§ 356. Practice of medicine, etc., without license. —

A person who practices, or attempts to practice, medicine or surgery in this state, unless authorized so to do by a license or diploma from some chartered school, state board of medical examiners or medical society, or who practices under cover of a license or diploma illegally or fraudulently obtained, is guilty of

a misdemeanor, punishable for the first offense by a fine of not less than fifty dollars nor more than two hundred dollars, and for any subsequent offense, by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment not less than thirty days, or by both such imprisonment and fine.

Id; Laws 1874, ch. 436, § 3.

(a) **Patent medicine.**— No defense that the medicine administered was patent medicine. (*Thompson v. Staats*, 15 Wend., 395; see, also, *People v. Medical Society of Erie*, 83 N. Y., 187; 25 How., 333.)

(b) **Medical society.**— A county medical society will not be compelled to admit a member who would be liable to expulsion for gross ignorance. (*Ex parte Paine*, 1 Hill, 665.)

A medical society has no right to make a by-law establishing a tariff of charge and enforce it by expulsion. (*People v. Medical Society of Erie*, 24 Barb., 570; *Hosack v. Coll. of Physicians*, 5 Wend., 547; *Fawcett v. Charles*, 18 Wend., 473.)

(c) **Expelling members.**— The statute providing for the expulsion of members from medical societies for gross ignorance or immoral conduct is constitutional. (*Ex parte Smith*, 10 Wend., 449.)

(d) **License— Suit for services.**— A physician in a suit for professional services need not produce his license. (*Thompson v. Sayre*, 1 Den., 175; *French v. Gridley*, 23 Wend., 469.)

(e) **Unlicensed physician.**— An unlicensed physician cannot maintain an action for services. (*Timmerman v. Morrison*, 14 Johns., 369; *Alcott v. Barb.*, 1 Wend., 526; *Smith v. Tracy*, 2 Hall, 465; see *contra*, *Bronson v. Hoffman*, 7 Hun, 674.)

(f) **Homeopathic physician.**— Since the act of 1844, a homeopathic physician is recognized as a physician. (*Carsi v. Maretsek*, 4 E. D. Smith, 1.)

(g) **Students.**— Physicians and surgeons may recover for the services of their students. (*People v. Monroe C. P.*, 4 Wend., 300.)

(h) **Malpractice.**— In an action against a physician for malpractice, the question is not whether he is skillful in his profession, but whether he treated this particular case properly. (*Carpenter v. Blake*, 6 Barb., 485; 2 Lans., 206; 50 N. Y., 696; see, also, *Baird v. Gillette*, 47 N. Y., 186.)

(i) **Skill a material issue.**— The question of his skill in his profession is a material issue. (*Carpenter v. Blake*, 50 N. Y., 696.)

(j) **Law of 1874 construed.**— Chapter 436, Laws of 1874, declaring it to be a misdemeanor for any person to practice medicine and surgery who is not authorized to do so by a license or diploma, etc., does not apply to one who undertakes to cure diseases by manipulating the patient's body by rubbing, kneading, pressing it, etc. (*Smith v. Lane*, 24 Hun, 632.)

§ 357. **Acts of intoxicated physicians.**—A physician or surgeon, or person practicing as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act, as a physician and surgeon, to another person by which the life of the latter is endangered, or his health seriously affected, is guilty of a misdemeanor.

3 R. S., 973, § 24; 2 R. S. (Edm.), 717, § 22; see § 200, *ante*, and cases there cited; also, *Carpenter v. Blake*, 75 N. Y., 358; 10 Hun, 674.)

§ 358. **Willfully poisoning food, etc.**—A person who willfully mingles poison with any food, drink or medicine, intended or prepared for the use of human beings, and a person who willfully poisons any spring, well or reservoir of water, is punishable by imprisonment in a state prison not exceeding ten years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or both such fine and imprisonment.

3 R. S., 988, § 48; 2 R. S. (Edm.), 685, § 38; see § 217, subd. 2, § 218, subd. 1, *ante*.

Crimes against public health are such as endanger the physical health of the people at large, such as polluting streams (8 Rand., 726) or fountains (8 N. H., 203; 37 Ala., 123), or rendering water unwholesome, corrupt or unfit for use. (8 N. H., 203; 6 Car. & P., 292; 4 Up. Can. Q. B., 158.)

Any acts or omissions which are liable to generate disease or communicate disease is an indictable offense. (3 Hill, 479; 35 Iowa, 570; 8 N. H., 203; 15 Wend., 397.)

§ 359. **Overloading passenger vessel.**—A person navigating a vessel for gain, who willfully or negligently receives so many passengers, or such a quantity of other lading, on board the vessel that by means thereof it sinks or is upset or injured, and thereby the life of a human being is endangered, is guilty of a misdemeanor.

3 R. S., 973, § 31; 2 R. S. (Edm.), 717, § 24; see § 197, *ante*.

§ 360. **Unauthorized pressure of steam.**—A person who applies, or causes to be applied, to a steam boiler a higher pressure of steam than is allowed by law, or by the inspector, officer or person authorized to limit the pressure of steam to be applied to such boiler, is guilty of a misdemeanor.

3 R. S., 973, § 31; 2 R. S. (Edm.), 717, § 25; see, also, Laws 1839, ch. 175, § 8.

Gross carelessness, resulting in injury to others, is criminal, even if the act done be lawful. (11 Humph., 159; 4 Mason, 505; 4 Car. & P., 398.)

Acts of omission, as well as commission, may be criminal. (2 Blatch., 528 4 Cox C. C., 449.)

So, also, as to the officer of the steamboat through whose negligence the explosion takes place. (5 McLean, 242; *People v. Jenkins*, 1 Hill, 469.)

(a) **Sunday carriers of passengers.**—Carriers of passengers on Sunday not protected from liability for negligence. (*Landers v. Staten I. R. Co.*, 18 Abb. [N. S.], 338.)

§ 361. **Generation of unsafe amount of steam.**—A captain or other person having charge of the machinery or boiler of a steamboat, used for the conveyance of passengers, in the waters of this state, who from ignorance or gross neglect, or for the purpose of increasing the speed of the boat, creates, or causes to be created, an undue and unsafe pressure of steam, is guilty of a misdemeanor.

3 R. S., 978, § 81; 2 R. S. (Edm.), 717, § 25; Laws 1839, ch. 175, § 8; *Landers v. Staten I. R. Co.*, 18 Abb., 378; *People v. Jenkins*, 1 Hill, 467, *supra*.

§ 362. **Mismanagement of steam boilers.**—An engineer or other person having charge of a steam boiler, steam engine, or other apparatus for generating or employing steam, employed in a railway, manufactory, or other mechanical works, who, willfully or from ignorance or gross neglect, creates or allows to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

3 R. S., 978, § 81; see § 198, *ante*.

Where a man appointed to tend a steam engine of a colliery left it in charge of an incompetent person and death ensued, he is guilty of manslaughter. (4 Cox C. C., 449; 8 Car. & K., 123.)

§ 363. **Fictitious copartnership names.**—A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation "and company," or "& Co." when no actual partner or partners are represented thereby, is guilty of a misdemeanor. But this section does not apply to any case, where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person.

3 R. S., 978, §§ 69, 70; Laws 1838, ch. 281.

For a violation of this statute a party is guilty of a misdemeanor. (*O'Toole v. Garvin*, 1 Hun, 92.)

A violation of the statute of 1838, prohibiting persons from transacting business under fictitious names, and requiring that the designation of company or Co., to represent an actual partner, is a misdemeanor. (*Swords v. Owens*, 43 How., 176; 2 [J. & Sp.] N. Y. Supr., 277.)

§ 364. (Amended 1882.) **Offenses against trade-marks.**—

A person who, knowingly, in a case where provision for the punishment of the offense is not otherwise specially made by statute :

1. Falsely makes or counterfeits a trade-mark ; or,
2. Affixes to any article, of merchandise, a false or counterfeit trade-mark, knowing the same to be false or counterfeit, or the genuine trade-mark, or an imitation of the trade-mark of another without the latter's consent ; or,
3. Sells, or keeps or offers for sale an article of merchandise, to which is affixed a false or counterfeit trade-mark, or the genuine trade-mark, or an imitation of the trade-mark of another, without the latter's consent ; or,
4. Has in his possession a counterfeit trade-mark, knowing it to be counterfeit, or a die, plate, brand, or other thing for the purpose of falsely making or counterfeiting a trade-mark ; or,
5. Makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise with such a trade-mark as to appear to indicate the quantity, quality or character of the article, but not indicating it truly ;

Is guilty of a misdemeanor.

3 R. S., 949, §§ 59, 62; Laws 1878, ch. 401, §§ 1, 2; Laws 1862, ch. 306, §§ 1, 2; Code Crim. Proc., § 53.

A trade-mark is a subject of forgery. (1 Wharton Cr. L. [8th ed.], § 690; 2 Russ. Cr., § 704.)

(a) **Fraud.**—One who fraudulently uses the trade-mark of another is liable to respond to the latter in damages. (*Taylor v. Carpenter*, 11 Paige, 292; 2 Sandf., 608.)

The fact that a simulated article is of equal value and quality to the genuine one is no defense. (*Coats v. Holbrook*, 2 Sandf. Ch., 586.)

(b) **Aliens.**—Aliens have the same rights of protection as citizens of the United States. (*Id.*)

It is no defense that the seller informs the purchaser that it is an imitation. (*Id.*)

(c) **Defense of fraud not valid.**—Where a defendant has fraudulently imitated plaintiff's trade-mark, he cannot set up the defense that the plaintiff's article is a fraud upon the public. (*Smith v. Woodruff*, 48 Barb., 438; *Comstock v. White*, 18 How., 421; 10 Abb., 264n.)

(d) **Fictitious name.**—The use of a fictitious name as the manufacturer does not necessarily render the trade-mark a fraudulent one. (*Dale v. Smithson*, 12 Abb., 287.)

To incur the penalty as prescribed by the act of 1862, the act complained of must have been done with the intent to defraud some person or body corporate. (*Low v. Hall*, 47 N. Y., 104.)

(*c*) **Act of 1845.**—The act of 1845, which made the counterfeiting of stamps, trade-marks, etc., a misdemeanor, though it would bar the counterfeiter's action for the price of the article sold, does not bar the action of an innocent seller. (*Rudderow v. Huntington*, 3 Sandf., 252.)

§ 365. (Amended 1882.) **"Article of merchandise" defined.**—The expression "article of merchandise," as used in this title, signifies any goods, wares, work of art, commodity, compound, mixture or other preparation or thing, which may be lawfully kept or offered for sale.

New.

Bank bills not properly classified as "goods, wares and merchandise." (*Sewell v. Allen*, 6 Wend., 335.)

§ 366. (Amended 1882.) **"Trade-mark" defined.**—A "trade-mark" is a mark used to indicate the maker, owner or seller of an article of merchandise, and includes, among other things, any name of a person or corporation, or any letter, word, device, emblem, figure, seal, stamp, diagram, brand, wrapper, ticket, stopper, label or other mark, lawfully adopted by him, and usually affixed to an article of merchandise to denote that the same was imported, manufactured, produced, sold, compounded, bottled, packed or otherwise prepared by him; and also a signature or mark, used or commonly placed by a painter, sculptor or other artist, upon a painting, drawing, engraving, statute or other work of art, to indicate that the same was designed or executed by him.

New in form. (See Laws 1882, ch. 306, §§ 1, 2.)

(*a*) **Genuine name.**—A person cannot acquire a trade-mark in a genuine name of a particular article of merchandise, *e. g.*, "Schnapps." (*Wolfe v. Burke*, 7 Lans., 151; reversed on other grounds, 56 N. Y., 115.)

(*b*) **Marks or devices.**—Words, marks or devices, which do not denote the goods or property or particular place of business of a person, but only the nature, kind or quality of the goods in which he deals, cannot be appropriated as his exclusive trade-mark. (*Stokes v. Landgraff*, 17 Barb., 608; *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf., 599; *Corwin v. Daly*, 7 Bosw., 222; *Bininger v. Wattles*, 28 How., 206.)

(*c*) **Ordinary words.**—No person can acquire an exclusive right to the use of words to denote the name of the article sold by him, if in their ordinary acceptance they designate the same or a similar article. (*Wolfe v. Gouldard*, 18 How., 64; *Town v. Stetson*, 3 Daly, 53; 5 Abb. Pr., 218; *Carnoll v. Davis*, 58 N. Y., 223; *Cook v. Starkweather*, 13 Abb. [N. S.], 392; *Corwin v. Daly*, 7 Bosw., 222.)

(*d*) **Exclusive right.**—A manufacturer cannot have the exclusive right to the manner of putting up his goods for sale. (*Fuber v. Fuber*, 49 Barb. 357; 3 Abb. [N. S.], 115.)

(e) **Common use of words.**— A person may acquire a trade-mark in the use of a common word to designate a particular style of goods manufactured by him. (*Meserole v. Tynberg*, 36 How., 141; 4 Abb. [N. S.], 410; see *Rellett v. Carlier*, 61 Barb., 485; 11 Abb. [N. S.], 186.)

(f) **Exclusive right.**— What is sufficient to establish plaintiff's right to the exclusive use of an arbitrary device as a trade-mark. (*Popham v. Wilcox*, 6 J. & Sp., 274.)

(g) **New words.**— New words, or compounds of those previously in use, may be protected as trade-marks. (*Caswell v. Davis*, 4 Abb. [N. S.], 6; 35 How., 76.)

(h) **New use.**— The new use of a word will be protected as a trade-mark. (*Meserole v. Tynberg*, 4 Abb. [N. S.], 410; 36 How., 14.)

(i) **Name of place.**— The use of the name of the place where an article is manufactured may be used as an exclusive trade-mark. (*Newman v. Alvord*, 49 Barb., 588; 35 How., 108; 51 N. Y., 189.)

(j) **Numerals.**— The number 303 used by a manufacturer of pens on his pens and boxes will be protected. (*Gillott v. Esterbrook*, 48 N. Y., 874.)

(k) **Congress water.**— The words "Congress water," designating a mineral water, is a valid trade-mark. (*Congress and Emp. Co. v. High Rock Cong. Spring Co.*, 45 N. Y., 291.)

(l) **Geographical name.**— A geographical name, as a rule, cannot be used as a trade mark. (*Lea v. Wolf*, 1 S. C., 626; 15 Abb. [N. S.], 1; 46 How., 157.)

(m) **One's own name.**— A person cannot acquire a trade-mark in his own name, so as to enjoin another of the same name impressing it upon his goods. (*Faber v. Faber*, 49 Barb., 357; 3 Abb. [N. S.], 115; *Wolfe v. Burke*, 7 Lans., 151; *Meneeley v. Meneeley*, 1 Hun, 367; 62 N. Y., 427; *Phelan v. Colender*, 6 Hun, 244.)

(n) **Name of hotel.**— The proprietor of a hotel has a trade-mark in the name of his house. (*Howard v. Henriques*, 8 Sand., 725.)

(o) **General public.**— Words belonging to the general public, which truly describe a known product, cannot be exclusively used as a trade-mark. (*Helmbold v. Helmbold Manuf'g Co.*, 53 How., 458.)

The words "Gold medal" on a wrapper not valid. (*Taylor v. Gillies*, 59 N. Y., 381.)

Where a theatre has acquired a particular name, as "Booth's Theatre," the continued use of the same will not be enjoined. (*Booth v. Jarrett*, 53 How., 169.)

§ 367. (Amended 1882.) "**Affixing**" defined.— A trade-mark is deemed to be affixed to an article of merchandise when it is placed in any manner, in or upon, either

1. The article itself; or,
2. A box, bale, barrel, bottle, case, cask or other vessel or package, or a cover, wrapper, stopper, brand, label or other thing, in, by or with which the goods are packed, inclosed or otherwise prepared for sale or disposition.

See Laws 1866, ch. 306, § 1.

§ 368. (Amended 1882.) **Trade-marks deemed "counterfeited."**—An "imitation of a trade-mark" is that which so far resembles a genuine trade-mark as to be likely to induce the belief that it is genuine, whether by the use of words or letters, similar in appearance or in sound, or by any sign, device or other means whatsoever.

Laws 1862, ch. 806, § 1, amended.

(a) **Imitation.**—One manufacturer may imitate the style of goods made by another, provided he use no device to deceive purchasers. (*Merrimack Manuf'g Co. v. Garner*, 4 E. D. Smith, 387; 2 Abb., 318.)

(b) **Colorable imitation.**—A party will be restrained from using a colorable imitation of another's trade-mark. (*Clark v. Clark*, 25 Barb., 76; *Brooklyn White Lead Co. v. Masury*, Id., 416; *Williams v. Johnson*, 2 Bosw., 1; *Brown v. Mercer*, 5 J. & Sp., 265; *Godillot v. Hazard*, 7 Daily Reg., 773.)

(c) **Close resemblance.**—The resemblance must be such as to amount to a false representation, which is liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose goods are imitated. (*Popham v. Cole*, 66 N. Y., 69; 6 J. & Sp., 274; 14 Abb. [N. S.], 206; *Electro Silicon Co. v. Levy*, 59 How., 469.)

When ordinary attention on the part of customers will detect the difference, the courts will not interfere. (*Popham v. Cole*, 66 N. Y., 69.)

(d) **Simulated mark.**—The simulated mark should have been so close a resemblance to the genuine as to deceive a person of ordinary caution. (*Coleman v. Crump*, 70 N. Y., 573; 8 J. & Sp., 548; *Electro Silicon Co. v. Levy*, 59 How., 469.)

§ 369. (Amended 1882.) **Refilling or selling stamped mineral water bottles, etc.**—Any person engaged in making, bottling, packing, selling or disposing of ale, beer, cider, mineral water or other beverage, may register his title as owner of a trade-mark by filing with the secretary of state and the clerk of the county where the principal place of business of such person is situated, a description of the marks and devices used by him in his business, and in case the same has not been heretofore published according to the laws existing at the time of publication, causing the same to be published in a newspaper of the county, three weeks daily, if in the city of New York or Brooklyn, and weekly if in any other part of the state; but no trade-mark shall be filed which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm or corporation unaccompanied by a mark sufficient to distinguish it from the same name when used by another person. After such registration the use without the consent of the owner of the trade-mark, so described, or the filling of any

bottle, siphon, barrel, vessel or thing for the purpose of sale, or for the sale therein, of any article of the same general nature and quality which said bottle, siphon, barrel, vessel or other thing before contained, without the obliteration or defacement of the trade-mark upon it, when such trade-mark can be obliterated or defaced without substantial injury to the bottle, siphon, barrel, vessel or other thing so as to prevent its wrongful use, shall be deemed a misdemeanor.

See 2 R. S., 252, §§ 11-13; Laws 1847, ch. —, § 2; Laws 1860, ch. 117, § 1; Laws 1875, ch. 303.)

The act in relation to the sale of bottles, passed 1860, imposes no penalty for secreting of a bottle, though subjecting a dealer in bottles to a search warrant. (*Mullins v. People*, 24 N. Y., 399; 23 How., 289.)

§ 370. (Amended 1882.) **Keeping such bottles with intent to refill or sell them.**—Any person engaged in the business of buying and selling bottles, siphons, barrels or other vessels or things, who shall, with intent to defraud the registered owner of a trade-mark, knowingly sell or offer for sale any bottle, siphon, barrel, vessel or other thing to any person, who he has reason to believe wrongfully intends to use the trade-mark upon it, or to fill such bottle, siphon, barrel, vessel or other thing in violation of section three hundred and sixty-nine, shall be deemed guilty of a misdemeanor.

2 R. S., 252, §§ 11-13; Laws 1860, ch. 117, § 2; see *Mullins v. People*, *supra*.

§ 371. (Amended 1882.) **Search for bottles kept in violation of law, authorized.**—Whenever a registered owner of a trade-mark, or his agent, makes oath before a magistrate that he has reason to believe and does believe, stating the grounds of his belief, that a bottle, siphon, barrel, vessel or other thing to which is affixed a trade-mark belonging to him is being used or filled, or has been sold or offered for sale, by any person whomsoever, in violation of the preceding sections, then the magistrate may issue a search warrant to discover the thing and cause the person having it in possession to be brought before him and may thereupon inquire into the circumstances, and if on examination he finds that such person has been guilty of the offense charged, he may hold the offender to bail to await the action of the grand jury, and the offender shall also be liable to an action on the case for damages for such wrongful use of such trade-mark at the suit of the owner thereof, and the party aggrieved shall also have his remedy according to

the course of equity to enjoin the wrongful use of his trade-mark, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use.

Id.; Laws 1873, ch. 808; Laws 1860, ch. 117, § 2; *Mullins v. People*, *supra*.

§ 372. Defacing marks upon wrecked property.— A person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading or other document tending to show the ownership thereof, is guilty of a misdemeanor.

2 R. S., 982, § 26; 1 R. L., 68; Laws 1869, ch. 493.

Goods contained in a vessel sunk or abandoned at sea, and which are not cast upon the shore, are not "wrecks" within the statute. (*Baker v. Hoag*, 7 N. Y., 555.)

The sea includes navigable rivers to extent of tide-water. (*Id.*)

§ 373. Defacing marks upon logs or lumber.— A person who unlawfully cuts out, alters or defaces any mark made upon any log or lumber, whether such mark be recorded or not, or puts a false mark upon any log or lumber floating in any of the waters of this state or lying upon land, is guilty of a misdemeanor.

2 R. S., 987, § 10; 1 R. S. (Edm.), 690, § 1; amended. Code Civ. Proc., § 56.

§ 374. Officer unlawfully detaining wrecked property.— An officer, whose duties pertain in any way to wrecked property, who, without authority of law, detains such property or the proceeds thereof, after the salvage and expenses chargeable thereon have been paid or offered to him, or who is guilty of any fraud embezzlement or extortion in the discharge of such duties, is guilty of a misdemeanor.

2 R. S., 981, § 24.

In the absence of an express agreement, whether services rendered in assisting to save a vessel are to be compensated on a "*quantum meruit*" principle, depends on circumstances. (*Sturgis v. Law*, 3 Sandf., 451.)

No salvage is due for a rescue or recapture by a neutral from a friendly power. (*Peck v. Randall's Trustees*, 1 Johns., 165.)

Where the party in possession of a salvage fund is irresponsible, it should be paid into court for distribution. (*Lewis v. Dodge*, 17 How. Pr., 229.)

Where one of the salvors is the owner of the salvaging vessel, he is fully compensated by receiving the value of his boat; he is not entitled to a further share as owner. (*Hawkins v. Avery*, 32 Barb., 551.)

§ 375. **Fraud in affairs of limited partnership.** — A member of a limited partnership, who is guilty of any fraud in the affairs of the partnership, is guilty of a misdemeanor.

2 R. S., 1156, § 19. (See *Tournade v. Mothfessel*, 3 Hun, 144.)

§ 376. **Solemnizing unlawful marriages.** — A minister or magistrate, who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent, or to be an idiot or an insane person, or a marriage to which, within his knowledge, a legal impediment exists, is guilty of a misdemeanor.

8 R. S., 149, § 11; 2 R. S. (Edm.), 146, § 12; Laws 1872, p. 19, ch. 25; see § 301, *ante*.

It is no defense to an indictment for bigamy that the marriage ceremony was performed by a pretended minister. (*Hayes v. People*, 25 N. Y., 390.)

§ 377. **Unlawful confinement of idiots, insane persons, etc.** — A person who confines an idiot, lunatic or insane person, in any other manner or in any other place than as authorized by law, and a person guilty of harsh, cruel or unkind treatment of, or any neglect of duty towards, any idiot, lunatic or insane person under confinement, whether lawfully or unlawfully confined, is guilty of a misdemeanor.

2 R. S., 842, §§ 7-10; 1 R. L., 635, § 11; see § 223, subd. 6, *ante*.

§ 378. **Taking usury.** — A person who directly or indirectly receives any interest, discount, or consideration upon the loan or forbearance of money, goods or things in action, greater than is allowed by statute, is guilty of a misdemeanor.

2 R. S., 1164, § 2; Laws 1879, ch. 538, § 1.

§ 379. **Reconfining persons discharged upon writ.** — A person, who either solely, or as a member of a court, or in the execution of a judgment, order or process, knowingly recommit, imprisons or restrains of his liberty, for the same cause, any person who has been discharged from imprisonment upon a writ of *habeas corpus*, or *certiorari*, is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or both; and in addition to the punishment prescribed therefor, he forfeits to the party aggrieved one thousand two hundred and fifty dollars, to be recovered in a civil action.

8 R. S., 881, § 76; 2 R. S. (Edm.), 591, § 59; Code Civil Proc., § 2050.

If a single judge, on *habeas corpus*, discharge a prisoner committed by the

court of chancery, such discharge is not conclusive upon the chancellor, who may recommit for the same cause. (*Yates' case*, 4 Johns., 817; *Yates v. Lansing*, 7 Johns., 395.)

(a) **Liability of court.**—Nor would such recommitment render the chancellor liable for the penalty of the "*habeas corpus*" act. (*Yates v. Lansing*, 5 Johns., 382; 9 id., 395.)

The penalty is imposed on persons acting ministerially. (*Id.*)

(b) **Null order of discharge.**—If a commissioner discharge a party from imprisonment for contempt, without jurisdiction, his order is a nullity, and he may be recommitted. (*People v. Spalding*, 10 Paige, 284; 7 Hill, 301; 4 How., 21.)

(c) **Cannot rearrest.**—It is a contempt of court for an officer to rearrest the prisoner on the same charge. (*Ex parte Filton*, 16 How., 303.)

(d) **Unauthorized.**—Defendant having been imprisoned for contempt, was discharged on the ground that the punishment was unauthorized. Subsequently he was retried and resented for same contempt. *Held*, error to retry him for same contempt and impose new and different penalties. (*Snyder v. Van Ingen*, 9 Hun, 569.)

§ 380. Concealing persons entitled to writ of deliverance.—A person having in his custody or power, or under his restraint, one who would be entitled to a writ of *habeas corpus* or *certiorari*, or for whose relief a writ of *habeas corpus* or *certiorari* has been issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, transfers the party to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who, without lawful excuse, refuses to produce him, is guilty of a misdemeanor, punishable as prescribed in the last section.

3 R. S., 832, § 77; 2 R. S. (Edm.), 591, §§ 61, 62, 64.

Where a party takes a child and conceals him from the custody of its father, he is liable to be prosecuted for a misdemeanor. (*Rising v. Dodge*, 2 Duer, 42.)

§ 381. Innkeepers and carriers refusing to receive guests and passengers.—A person who, either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

New. (See § 383, *post.*)

§ 382. Frauds on hotel keepers.—A person who obtains any food or accommodation at an inn without paying therefor, with intent to defraud the proprietor or manager thereof, or who

obtains credit at an inn by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, absconds and surreptitiously removes his baggage therefrom, without paying for his food and accommodation, is guilty of a misdemeanor.

2 R. S., 945, § 62.

§ 383. Protecting civil and public rights. — No citizen of this state can by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations. The violation of this section is a misdemeanor, punishable by a fine of not less than fifty dollars, nor more than five hundred dollars.

1 R. S., 377, §§ 22-24; see § 381, *ante*.

§ 384. Acrobatic exhibitions. — The proprietor, occupant or lessee of any place where acrobatic exhibitions are held, who permits any person to perform on any trapeze, rope, pole or other acrobatic contrivance, without net work, or other sufficient means of protection from falling or other accident, is guilty of a misdemeanor, punishable, for the first offense by a fine of two hundred and fifty dollars, and for each subsequent offense, by a fine of two hundred and fifty dollars and imprisonment not less than three months nor more than one year.

2 R. S., 916, §§ 18, 19.

TITLE XII.

OF CRIMES AGAINST THE PUBLIC HEALTH AND SAFETY.

SECTION 385. "Public nuisance" defined.

- 386. Unequal damage.
- 387. Maintaining a nuisance a misdemeanor.
- 388. Permitting building to be used for nuisance.
- 389. Keeping gunpowder unlawfully.
- 390. Throwing gas-tar, etc., into public waters.
- 391. Violation of quarantine laws, by master of vessel.
- 392. Giving false information relative to vessel, or permitting person to land before visit of health officers.
- 393. Landing from vessel before visit of health officers.
- 394. Going on board vessel at quarantine grounds, or entering quarantine grounds without leave.
- 395. Violating quarantine regulations.
- 396. Obstructing health officer in performance of his duty.
- 397. Willful violation of health laws.
- 398. Unlicensed piloting.
- 399. Coasting steamers excepted.
- 400. Acting as port-warden without authority.
- 401. Apothecary omitting to label drugs, or labeling them wrongly.
- 402. Apothecary selling poison without recording the sale.
- 403. Refusing to exhibit record.
- 404. Selling poison without label.
- 405. Medical prescriptions.
- 406. Concealing foreign matter in merchandise.
- 407. Adulterating food, drugs, liquors, etc.
- 408. Disposing of tainted food.
- 409. Making, selling, etc., dangerous weapons.
- 410. Carrying, using, etc., certain weapons.
- 411. Possession, presumptive evidence.
- 412. Carrying concealed weapons.
- 413. Negligence in respect to fires.
- 414. Refusing to assist in extinguishing fire in the woods.
- 415. Obstructing attempts to extinguish fires.
- 416. Maintaining ferry without authority of law.
- 417. Violating condition of recognizance to keep a ferry.
- 418. Employment of engineer who cannot read.
- 419. Person acting as engineer who cannot read.
- 420. Intoxication of persons running trains and boats.
- 421. Failure to ring bell, etc.
- 422. Placing passenger car in front of baggage car.
- 423. Platforms.
- 424. Other violations of duty by officers, agents or servants of railroad companies.
- 425. Officers of railroad companies to be uniformed.
- 426. Riding on freight trains.

SECTION 427. Dangerous exhibitions; bathing.

- 428. Fires and lights on vessels in New York, Kings and Queens counties.
- 429. Duty of guarding ice cuttings; how long such guards must be maintained; violation of duty to maintain guards around ice cuttings.
- 430. Articles in imitation of food.
- 431. Noisome or unwholesome substances, etc., in highway.
- 432. Ambulances.
- 433. Using net or weir unlawfully in Hudson river.
- 434. Exposing person affected with a contagious disease in a public place.
- 435. False rumors as to public funds, etc.
- 436. Eavesdropping.
- 437. Destroying invoice.
- 438. False labels.
- 439. Skimmed milk.
- 440. Master of vessel bringing foreign convict.
- 441. Non-resident taking or planting oysters.
- 442. Use of certain dredges.
- 443. Mock auctions.
- 444. Interfering with navigation.
- 445. Maintaining private insane asylums.
- 446. Entry into agricultural fair grounds.
- 447. Drugging person, etc.

§ 385. "Public nuisance" defined. — A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission,

1. Annoys, injures, or endangers the comfort, repose, health or safety of any considerable number of persons; or,
2. Offends public decency; or,
3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a public park, square, street or highway; or,
4. In any way renders a considerable number of persons insecure in life, or the use of property.

2 R. S. (Edm.), 848, §§ 1, 2; Code Civ. Proc., §§ 1660, 1662.

(a) **Distillery.** — A distillery situated in a populous city may become a public nuisance. (*Prescott's case*, 2 C. H. Rec., 161; 27 Ind., 430.)

(b) **A lawful business,** in order to become a nuisance, must be so conducted as to interrupt the public in the reasonable enjoyment of life and property. (*Prout's case*, 4 C. H. Rec., 87; *Lynch's case*, 6 id., 61; *People v. Cunningham*, 10 Den., 524.)

(c) **Length of time.**—No length of time will legalize a nuisance. (*People v. Cunningham*, 1 Den., 524; *Rochester v. Erickson*, 46 Barb., 92; *Ogdensburgh v. Lovejoy*, 2 S. C., 83; 58 N. Y., 62; *Campbell v. Seaman*, 63 id., 568; 2 S. C., 231.)

(d) **The legislature, however, may legalize it.**—*People v. N. Y. Gas Co.*, 6 Lana., 467; *Phoenix v. Com'rs of Emigration*, 12 How., 1; *Delany v. Blizard*, 7 Hun, 7; *Patten v. N. Y. E. R. R. Co.*, 3 Abb. N. C., 306.

It is no defense to an indictment for a nuisance that it was erected remote from habitation, and that the prosecutors afterward erected buildings in the vicinity. (*Taylor v. People*, 6 Park., 347.)

(e) **A bowling alley kept for gain or hire is a public nuisance.** (*Tanner v. Albion*, 5 Hill, 121; *Updike v. Campbell*, 4 E. D. Smith, 570.)

(f) **Billiard room.**—Keeping a billiard room is not, "*per se*," a nuisance, unless kept as a tavern. (*People v. Sergeant*, 8 Cow., 139.)

(g) **A theatre may become a common nuisance.** (*People v. Baldwin*, 1 Wh. C. C., 279.)

(h) **Gunpowder.**—The careless or negligent keeping of gunpowder near dwelling-houses, so as to endanger life, is a public nuisance. (*Bradley v. People*, 56 Barb., 72; *Myers v. Malcolm*, 6 Hill, 292; *People v. Sands*, 1 Johns., 78; *Heeg v. Licht*, 80 N. Y., 579; 84 Me., 36; 74 Penn. St., 236; 107 Mass., 188; 1 Swan, 213; 3 East, 192; 12 Mod., 342.)

(i) **Houses of ill-fame**, if open and notorious, are public nuisances. (3 Yerg., 462; 4 McCord, 472; 2 Serg. & R., 298; 42 Ind., 327; *Harwood v. People*, 26 N. Y., 190.)

(j) **Disorderly house** is a public nuisance. (*People v. Rowland*, 1 Wh. C. C., 286; *People v. Carey*, 4 Park., 238; *People v. Mauch*, 24 How., 276; *Harwood v. People*, 26 N. Y., 190.)

(k) **Clergyman.**—One assuming to be a clergyman may so conduct himself in regard to his house of worship as to be indictable for keeping a disorderly house. (*Brood's case*, 3 C. H. Rec., 7.)

(l) **A municipal corporation may erect and maintain a public nuisance.** (*Babcock v. Buffalo*, 1 Sheld., 317; *People v. Albany*, 11 Wend., 539.)

(m) **An infant or feme covert**, under certain circumstances, is not responsible for a nuisance. (*People v. Townsend*, 3 Hill, 479.)

(n) **Indictment for nuisance, what required.**—*People v. Townsend*, 3 Hill, 479; *Taylor v. People*, 6 Park., 347; *Munson v. People*, 5 Park., 16.

(o) **Spring guns set to the highway**, whereby life is endangered, are public nuisances. (31 Conn., 479; 59 Ala., 1.)

(p) **Racing on public roads.**—1 Head., 154; 83 Ala., 428; 6 Baxt. (Tenn.), 545; *Peters' C. C.*, 890.

(q) **Blasting**, so as to project stones on public highway. (*Leigh & C.*, 489; 51 Cal., 142; 45 Ind., 429.)

(r) **Things overhanging highway.**—117 Mass., 114; 67 Penn. St., 353; 1 Salk., 837.

OFFENSES AGAINST PUBLIC DECENCY.

(1) **Keeping a house of prostitution** is a public nuisance. (*Jacobowsky v. People*, 6 Hun, 524; 64 N. Y., 659; *Barnescotta v. People*, 10 Hun, 187; 69 N. Y., 612; *People v. Carey*, 1 Sheld., 573; *People v. Rowland*, 1 Wh. C. C., 286; *People v. Mauch*, 24 How., 276.)

(2) **Shocking to public morality.**— It is enough if the public nuisance shocks public morality. (10 Humph., 99; 1 Swan, 42; 8 Humph., 203; 19 Penn. St., 412; 3 Day, 103; 52 Ind., 311; 126 Mass., 46; 7 Conn., 267; 17 Mass., 336; 10 Ind., 140.)

(3) **Profane swearing and blasphemy** is a public nuisance. (*People v. Ruggles*, 8 Johns., 290; 43 Cal., 420; 2 Har. [Del.], 553; 9 Iredell, 38; 11 Serg. & R., 394; 63 N. C., 259; 3 Sneed, 134; 13 Pick., 359; 19 Penn. St., 412.)

(4) **Obscene pictures.**— So, also, the public exhibition of obscene pictures, etc. (17 Mass., 336; 1 Hilt., 590; 2 Serg. & R., 91.)

(5) **Also indecent exposure** of one's person in public. (*Miller v. People*, 5 Barb., 203; *People v. Butler*, 4 Hun, 636.)

(6) **Lawful business.**— The carrying on of a lawful business in such a way as to cause unreasonable obstruction to a public highway. (*People v. Cunningham*, 1 Den., 524; *Waterford and Whitehall T. Co. v. People*, 8 Barb., 161.)

(7) **Public highway.**— Where an encroachment on a public highway does not obstruct. (*Howard v. Robbins*, 1 Lans., 63.)

Whatever interferes with public travel is a nuisance. (6 East, 427; 1 McCord, 104.)

The front steps of dwellings may be so built as to form an obstruction and become a public nuisance. (107 Mass., 234.)

A mere encroachment also. (35 Conn., 314; 12 Cush., 254; 14 Gray, 69.)

(8) **Railroad companies** having permission by law to cross a highway are indictable if they do not do so in a proper manner. (*People v. N. Y. C. R. R. Co.*, 74 N. Y., 302.)

(9) **Bridge.**— An unsafe bridge is a public nuisance. (*People v. Mohawk Bridge Co.*, 7 Alb. L. J., 232.)

So, also, a defective road. (11 Wend., 597; *Susquehanna Trans. Co. v. People*, 15 Wend., 267; *Waterford Turnpike Co. v. People*, 9 Barb., 161; *People v. Cunningham*, 1 Den., 524; *Harlem v. Hunniston*, 6 Cow., 189; *Lansing v. Smith*, 8 id., 146; *Dyggert v. Schenck*, 23 Wend., 446; *Drake v. Rogers*, 3 Hill, 604; *People v. Lambier*, 5 Den., 9; *Mosher v. U. and S. R. R.*, 8 Barb., 427; *Hart v. Albany*, 9 Wend., 571; *Hecker v. N. Y.*, 13 How., 549; 24 Barb., 815; *Peckham v. Henderson*, 27 id., 207; *People v. Vanderbilt*, 24 How., 301; *Westmore v. A. W. L. Co.*, 37 Barb., 70.)

(10) **River.**— An obstruction in a river, so as to interfere with public navigation, is a nuisance. (*Moore v. Commissioners of Pilots*, 32 How. Pr., 182; 43 Me., 198; 13 How., 518; 1 Penn. St., 505; 4 Jones [N. C.], 107; 10 Ill., 351; 2 Mich., 519; 16 Q. B., 1022.)

(11) **To divert part of the water.**— 2 Show., 80; 5 Pick., 199; 6 Rand. 726; 4 Wis., 387; 35 Iowa, 670.

(12) **A wharf** may be so constructed as to fill up the channel and become a public nuisance. (*People v. Vanderbilt*, 26 N. Y., 287; 28 id., 396; Thach. C. C., 211; 2 Stark., 511.)

(13) **Bridge.**—So, also, a bridge over a highway. (*Knox v. New York*, 55 Barb., 404; *Chenango Bridge v. Lewis*, 63 Barb., 111; *In re Binghamton Bridge*, 3 Wall., 51.)

(14) **Street railroad** may be so constructed. (*Wetmore v. Story*, 22 Barb., 414; *Hamilton v. N. Y. and H. R. R. Co.*, 9 Paige, 71; *Anderson v. Rochester, etc.*, 9 How., 553; *Hertz v. L. I. R. R. Co.*, 18 Barb., 646.)

(15) **Subterranean streams** not subject to same laws as surface streams. (29 N. Y., 466; *Woodruff v. Fisher*, 17 Barb., 224.)

(16) **State dam.**—Neglect to keep a state dam in good repair does not render it a nuisance. (*Harris v. Thompson*, 9 Barb., 350.)

(17) **Railroad depot** may be so constructed as to become a public nuisance. (*Phœnix v. Com'rs of Emigration*, 12 How., 1.)

(18) **A private dam** may become a nuisance if it so overflow other lands and renders the neighborhood unhealthy. (*Renwick v. Morris*, 3 Hill, 621; 7 id., 575; *Adams v. Popham*, 76 N. Y., 410; *Brown v. Bowen*, 30 N. Y., 519.)

(19) **A sluiceway or coal-hole** may become nuisances. (*Thomson v. Allen*, 7 Lana., 459; *Irwin v. Wood*, 51 N. Y., 224; *Clifford v. Dam*, 81 N. Y., 52.)

(20) **Gas-pipes** may be so laid. (*McCannis v. Citizens' Gas-Light Co.*, 40 Barb., 380.)

(21) **Obstructions to highway or tow-path.**—*Osborn v. Union Ferry Co.*, 53 Barb., 629; *Conklin v. Phœnix Mills*, 63 Barb., 299.

A limekiln is a nuisance when improperly conducted or located. (*Hutchins v. Smith*, 63 Barb., 111.)

A bridge over a stream, whose erection is duly authorized by congress, is not a nuisance. (*People v. Kelly*, 76 N. Y., 475.)

(22) The conducting a lawful business in such a manner as to render insecure the life or property of others is a public nuisance. (*Prescott's case*, 2 C. H. Rec., 161; *Proust's case*, 4 id., 87; *Lynch's case*, 6 id., 61; *Callin v. Valentine*, 9 Paige, 575; *Brady v. Weeks*, 8 Barb., 157; *Myers v. Malcolm*, 6 Hill, 292; *Bradley v. People*, 56 Barb., 72.)

§ 386. **Unequal damage.**—An act which affects a considerable number of persons, in either of the ways specified in the last section, is not less a nuisance because the extent of the damage is unequal.

New in form. (*Lansing v. Smith*, 8 Cow., 146; *Goldsmith v. Jones*, 43 How., 415.)

§ 387. **Maintaining a nuisance a misdemeanor.**—A person, who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who willfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor.

New.

A person who knowingly maintains a nuisance is equally guilty with him who erected it. (*Wasner v. D., L. & W. R. R. Co.*, 80 N. Y., 212.)

§ 388. **Permitting building to be used for nuisance.** — A person who lets, or permits to be used, a building, or portion of a building, knowing that it is intended to be used for committing or maintaining a public nuisance, is guilty of a misdemeanor.

2 R. S. (Edm.), 343, § 2; 1 R. L., 80, § 5; see §§ 383, 343, *ante*.

The lessor of premises offensively used as a livery stable, unless he knew that the premises would be so managed as to constitute a nuisance. (*Morris v. Brown*, Anth. N. P., 368; *Waggoner v. Jermaine*, 3 Den., 306; *Brown v. Woodworth*, 5 Barb., 550; *Conhocton Stone Co. v. Buffalo*, 53 id., 390.)

§ 389. **Keeping gunpowder unlawfully.** — A person, who makes or keeps gunpowder, nitro-glycerine, or any other explosive or combustible material, within a city or village, or carries such materials through the streets thereof, in a quantity or manner prohibited by law or by ordinance of the city or village, is guilty of a misdemeanor. And a person, who, by the careless, negligent, or unauthorized use or management of gunpowder or other explosive substance, injures, or occasions the injury of, the person or property of another, is punishable by imprisonment for not more than two years.

Laws 1846, ch. 291, § 19; Laws 1871, ch. 742, § 2; see § 201, *ante*.

The keeping or manufacturing of inflammable substances or explosives in such manner as to endanger property, is a misdemeanor. (*Bradley v. People*, 56 Barb., 72; *People v. Sands*, 1 Johns., 78; 34 Me., 36; 107 Mass., 188; 74 Penn. St., 230; 1 Swan, 213; *Thatch. C. C.*, 14; 3 East, 192.)

It is a misdemeanor to keep large quantities of gunpowder in populous places. (*People v. Sands*, 1 Johns., 78; *Myers v. Malcolm*, 6 Hill, 292; *Bradley v. People*, 56 Barb., 72; 12 Mod., 342; 2 Strange, 1167; *Heeg v. Licht*, 80 N. Y., 579; *Fello v. Jones*, 4 Keyes, 328.)

§ 390. **Throwing gas-tar, etc., into public waters.** — A person who throws or deposits gas-tar, or the refuse of a gas house or gas factory, or offal, refuse, or any other noxious, offensive, or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters, is guilty of a misdemeanor.

3 R. S., 979, § 76; Laws 1845, ch. 201.

§ 391. **Violation of quarantine laws, by master of vessel.** — A master of a vessel subject to quarantine or visitation by the health officer, arriving in the port of New York, who refuses or omits,

1. To proceed to and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo and passengers, to the examination of the health officer, and to furnish all necessary information to enable that officer to determine the length of quarantine and other regulations to which they ought respectively to be subject; or,

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the directions and regulations prescribed by law, and with such as any of the officers of health, by virtue of the authority given to them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers or crew, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

3 R. S., 1057, § 32; Laws 1868, ch. 358; Laws 1865, ch. 592, § 32; 2 Laws 1871, p. 1572, ch. 715; *Id.*, 1868, p. 1601, ch. 717.

§ 392. Giving false information relative to vessel, or permitting person to land before visit of health officers.—
A master of a vessel, hailed by a pilot, who

1. Gives false information to such pilot, relative to the condition of his vessel, crew or passengers, or the health of the place or places from whence he came, or refuses to give such information as shall be lawfully required; or,

2. Lands any person from his vessel, or permits any person, except a pilot, to come on board of his vessel, or unlades or tranships any portion of his cargo, before his vessel has been visited and examined by the health officers; or,

3. Approaches with his vessel nearer the city of New York than the place of quarantine to which he may be directed, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

2 R. S., 1057, § 33; Laws 1868, ch. 358, § 33; 2 Laws 1868, ch. 717; 2 Laws 1871, ch. 715.

§ 393. Landing from vessel before visit of health officers.
A person, who, being on board any vessel at the time of her arrival at the port of New York, lands from such vessel, or unlades, or tranships, or assists in unlading or transshipping any portion of her cargo, before such vessel has been visited and examined by the health officers, is punishable by imprisonment

not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

3 R. S., 1057, § 33; Laws 1863, ch. 358, § 33; 2 Laws 1868, ch. 717; 2 Laws 1871, ch. 715.

§ 394. Going on board vessel at quarantine grounds, or entering quarantine grounds without leave.—A person who goes on board of, or has any communication or intercourse with any vessel at quarantine, or with any of the crew or passengers of such vessel, without the permission of the health officer, and every person who, without such authority, enters the quarantine grounds or anchorage, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both; and in addition thereto he may be detained at quarantine so long as the health officer directs, not exceeding twenty days. And in case such person shall be taken sick of any infectious, contagious or pestilential disease, during such twenty days, he may be detained at the marine hospital, for such further time as the health officer directs.

3 R. S., 1058, § 36; *Id.*, 1062, § 56; Laws 1863, ch. 358, § 36; amended, Laws 1865, ch. 592, § 9.

§ 395. Violating quarantine regulations.—A person who, having been lawfully ordered by a health officer to be detained in quarantine, and not having been discharged, leaves the quarantine grounds or anchorage, or willfully violates any quarantine law or regulation, is guilty of a misdemeanor.

3 R. S., 1058 § 36; Laws 1863, ch. 358, § 36; amended, Laws 1865, ch. 592, § 9.

§ 396. Obstructing health officer in performance of his duty.—A person who willfully opposes or obstructs a health officer or physician charged with the enforcement of the health laws, in performing any legal duty, is guilty of a misdemeanor.

3 R. S., 1054, § 25; *Id.*, 1062, § 56; Laws 1865, ch. 592, § 11, in part.

§ 397. Willful violation of health laws.—A person who willfully violates any provision of the health laws, the punishment for violating which is not otherwise prescribed by those laws or by this Code; and a person who willfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any board of health or health officer, or any regula-

tion lawfully made or established by any public officer under authority of the health laws, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

Id.

§ 398. (Amended 1882.) **Unlicensed piloting.** — A person, other than a lawfully authorized branch Hell Gate pilot, who pilots or offers to pilot, or tows or offers to tow, any boat or vessel (except barges, vessels under fifty-five tons burthen, and canal boats actually used in navigating the canals) through that part of the East river commonly called Hell Gate, is guilty of a misdemeanor. But no pilotage shall be charged to any vessel under a coasting license on entering or departing from the port of New York, by way of the East river, called Hell Gate, unless, such vessel actually employs a pilot; and the making such such* charge or demand without such employment, shall be deemed a misdemeanor.

Laws 1865, ch. 115; Laws 1858, ch. 467, § 29; Laws 1854, ch. 196, § 5; Laws 1857, ch. 243, § 1; Laws 1881, ch. 498.

(a) **Hell Gate pilot.** — If any other person than a branch Hell Gate pilot shall pilot or tow for any other person any vessel, etc., through the channel commonly called Hell Gate, he shall be deemed guilty of a misdemeanor. (*People v. Sperry*, 50 Barb., 170; *Com'rs of Pilots v. Pacific Mail S. S. Co.*, 52 N. Y., 609.)

(b) **Hell Gate statute constitutional.** — The act concerning the pilots of the channel of the East river, commonly called Hell Gate, held constitutional and valid. (*Stillwell v. Raynor*, 1 Daly, 47.)

(c) **Several states may legislate.** — The Federal constitution does not deprive the several states of power to legislate upon the subject of pilots. (*Stillwell v. Raynor*, 12 How. [U. S.], 299.)

(d) **United States pilot laws.** — Notwithstanding the United States pilotage act, sea-going vessels in New York harbor are subject to pilotage under state law. (*Henderson v. Spofford*, 10 Abb. [N. S.], 140; 3 Daly, 361.)

(e) **Steam-tug pilot.** — The pilot of a steam tug or tow boat who, being upon his own boat, tows a vessel through Hell Gate, and, by signals made to the helmsman of the vessel in tow, directs changes at the helm to conform to the steamer's movements, does not pilot such vessel within the prohibition relative to Hell Gate pilots. (*People v. Francisco*, 10 Abb., 30; *Francisco v. People*, 4 Park., 139; 18 How., 475.)

§ 399. **Coasting steamers excepted.** — The last section does not apply to vessels propelled wholly or partly by steam, owned

* So in the original.

or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

Laws 1865, ch. 115; Laws 1857, ch. 248, § 2; see *Grinold v. Master and Wardens of N. Y.*, 9 Johns., 76; *Nickerson v. Mason*, 13 Wend., 64; *Sturgis v. Spofford*, 52 Barb., 436; 45 N. Y., 446.

§ 400. Acting as port warden without authority. — A person who not being a port warden, assumes or undertakes to act as such, or undertakes the performance of any of the duties prescribed by law, as pertaining to the office of port warden; and a person who knowingly employs any other than the wardens for the performance of such duties; and a person who issues any certificate of a survey on vessels, materials or goods damaged, with intent to avoid the provisions of any statute, is guilty of a misdemeanor.

2 R. S., 209, § 119; Laws 1857, ch. 405, § 6; see *Tynkham v. Tapscott*, 17 N. Y., 141, *post*; *Wardens of N. Y. v. Cartwright*, 4 Sandf., 286.

§ 401. Apothecary omitting to label drugs, or labeling them wrongly. — An apothecary, or druggist, or a person employed as clerk or salesman by an apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently or ignorantly omits to label the same, or puts any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug or medicine, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor.

2 R. S. (Edm.), 717, § 28; Laws 1860, ch. 442, § 1; Laws 1862, ch. 272, § 2; Code Crim. Proc., § 56.

A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. (*Thomas v. Winchester*, 7 N. Y., 397.)

Where such injury is done by an agent, the principal is liable in damages for the injury. (*Id.*)

§ 402. Apothecary selling poison without recording the sale. — An apothecary or druggist, or a person employed as clerk

or salesman by an apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who sells or gives any poison or poisonous substance, without first recording in a book to be kept for that purpose, the name and residence of the person receiving such poison, together with the kind and quantity of such poison received and the name and residence of some person known to such dealer, as a witness to the transaction, except upon the written order or prescription of some practicing physician whose name is attached to the order, is guilty of a misdemeanor.

3 R. S., 973, §§ 26-28; Laws 1860, p. 765, ch. 442; Laws 1862, p. 468, ch. 273; *Thomas v. Winchester*, *supra*.

§ 403. **Refusing to exhibit record.**—A person whose duty it is by the last section to keep a book for recording the sale or gift of poisons, who willfully refuses to permit any person to inspect said book upon reasonable demand made during ordinary business hours, is punishable by a fine not exceeding fifty dollars.

Laws 1860, ch. 442, §§ 1, 5; Laws 1862, ch. 272; Code Crim. Proc., § 56.

§ 404. **Selling poison without label.**—A person who sells, gives away or disposes of any poison or poisonous substance (except upon the order or prescription of a regularly authorized practicing physician), without attaching to the vial, box or parcel containing such poisonous substance, a label with the name and residence of such person, the word "poison" and the name of such poison, all written or printed thereon in plain and legible characters, is guilty of a misdemeanor.

3 R. S., 973, §§ 25, 27, 28; 2 R. S. (Edm.), 717, § 23; Laws 1860, ch. 442, §§ 2, 5; Code Crim. Proc., § 56; *Thomas v. Winchester*, *supra*.

§ 405. **Medical prescriptions.**—No person employed in a drug store or apothecary's shop shall prepare a medical prescription, unless he has served two years' apprenticeship in such a store or shop, or is a graduate of a medical college or college of pharmacy, except under the direct supervision of some person possessing one of those qualifications; nor shall any proprietor or other person in charge of such store or shop permit any person not possessing such qualifications to prepare a medical prescription in his store or shop, except under such supervision. A person violating any provision of this section is guilty of a misdemeanor punishable by a fine not exceeding one hundred dollars, or by

imprisonment not exceeding six months; and in case of death ensuing from such violation, the person offending is guilty of a felony punishable by a fine not less than one thousand dollars nor more than five thousand dollars, or by imprisonment not less than two years nor more than four years, or by both such fine and imprisonment.

3 R. S., 247, § 8; Laws 1869, ch. 478, §§ 1, 2.

§ 406. Concealing foreign matter in merchandise. — A person who, with intent to defraud, while putting up in a barrel, bag, bale, box, or other package, cotton, hops, hay, or any other article of merchandise whatever, usually sold by weight in such packages, places or conceals therein any other substance or thing whatever, in a case where special provision for the punishment thereof is not otherwise made by statute, is guilty of a misdemeanor.

New. (Laws 1848, ch. 202; see § 580, *post.*)

§ 407. Adulterating food, drugs, liquor, etc. — A person who, either,

1. With intent that the same may be sold as unadulterated or undiluted, adulterates or dilutes wine, milk, distilled spirits, or malt liquor, or any drug, medicine, food, or drink, for man or beast; or,

2. Knowing that the same has been adulterated or diluted, offers for sale or sells the same, as unadulterated or undiluted, or without disclosing or informing the purchaser that the same has been adulterated or diluted, in a case where special provision has not been otherwise made by statute for the punishment of the offense;

Is guilty of a misdemeanor.

New.

To render unwholesome any food to be used as food is indictable. (3 Maule & S., 11; 4 Camp., 12; 4 Maule & S., 214.)

That the party did not know the provisions were adulterated has been held no defense. (2 Allen, 180; 9 id., 489; 15 Mees. & W., 404; 10 Allen, 199; 103 Mass., 444; 10 R. I., 238.)

§ 408. Disposing of tainted food. — A person who with intent that the same may be used as food, drink, or medicine, sells, or offers or exposes for sale, any article whatever which, to his knowledge, is tainted or spoiled, or for any cause unfit

to be used as such food, drink, or medicine, is guilty of a misdemeanor.

New.

The slaughtering of a diseased cow to be sold for food is within the statute. (*People v. Goodrich*, 19 N. Y., 574; 3 Park., 622.) What are unwholesome meats, etc. (*State v. Norton*, 2 Iredell, 40; *Hunter v. State*, 1 Head., 160; *State v. Smith*, 3 Hawkes, 378.)

On trial of an indictment for selling unwholesome beef, the judge refused to charge that if the jury found the meat was sold merely as an article of merchandise and not for consumption as food, defendant was not guilty. *Held*, not error. (*People v. Parker*, 38 N. Y., 85.)

§ 409. **Making, selling, etc., dangerous weapons.** — A person who manufactures, or causes to be manufactured, or sells or keeps for sale, or offers, or gives, or disposes of, any instrument or weapon of the kind usually known as slung-shot, billy, sand-club, or metal knuckles, is guilty of a misdemeanor.

Laws 1849, ch. 278, § 1; Laws 1866, ch. 716, § 1; Code Crim. Proc., § 56.

§ 410. **Carrying, using, etc., certain weapons.** — A person, who attempts to use against another, or who, with intent so to use, carries, conceals, or possesses, any instrument or weapon of the kind commonly known as slung-shot, billy, sand-club or metal knuckles, or a dagger, dirk or dangerous knife, is guilty of a felony.

3 R. S., 937, § 38; Laws 1866, ch. 716, § 1.

What are concealed weapons within the statute. (*State v. West*, 6 Jones, 605; *Shadle v. State*, 34 Texas, 572; *Evans v. State*, 46 Ala., 88; *Owens v. State*, 81 id., 387.)

§ 411. **Possession, presumptive evidence.** — The possession, by any person other than a public officer, of any of the weapons specified in the last section, concealed or furtively carried on the person, is presumptive evidence of carrying, or concealing, or possessing, with intent to use the same in violation of that section.

3 R. S., 937, § 38; Laws 1866, ch. 716, § 1.

§ 412. Repealed in 1882.

Id.; *State v. Huntley*, 3 Iredell, 418.

§ 413. **Negligence in respect to fires.** — A person who negligently sets fire to his own woods, by means whereof the property of another is endangered, or who negligently suffers

any fire upon his own land to extend beyond the limits thereof, is guilty of a misdemeanor.

2 R. S., 985, § 1; 2 R. S. (Edm.), 985, § 1; 1 R. L., 123, §§ 1, 2, 3; see Code Crim. Proc., § 56.

The court will not set aside a verdict recovered under this statute on the ground that it is against the evidence. (*Lawyer v. Smith*, 1 Den., 207.)

§ 414. Refusing to assist in extinguishing fire in the woods. — A person who, having been lawfully ordered to repair to the place of a fire in the woods and assist in extinguishing it, omits, without lawful excuse to comply with the order, is guilty of a misdemeanor.

2 R. S., 985, § 3; 2 R. S. (Edm.), 986, § 3; 1 R. L., 123, §§ 1, 2, 3; *Lawyer v. Smith*, *supra*; Code Crim. Proc., § 56.

§ 415. Obstructing attempts to extinguish fires. — A person who, at any burning of a building, is guilty of any disobedience to lawful orders of a public officer or fireman, or of any resistance to, or interference with, the lawful efforts of any fireman or company of firemen, to extinguish the same, or of any disorderly conduct likely to prevent the same from being extinguished, or who forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

New.

§ 416. Maintaining ferry without authority of law. — A person who maintains a ferry for profit or hire upon any waters within this state, without authority of law, is punishable by a fine not exceeding twenty-five dollars for each time of crossing or running such ferry. Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either.

2 R. S., 181, § 8; 2 R. L., 210, § 1.

A person whose ferry privilege is disturbed cannot bring an action on the case; his remedy is to sue for the penalty given by statute. (*Almy v. Harris*, 5 Johns., 175.)

To maintain a ferry upon Niagara river, unless authorized by law, will subject the offender to punishment as for a misdemeanor. (*People v. Babcock*, 11 Wend., 587.)

The maintaining by a railroad corporation of a ferry upon which it regularly transports persons other than its own passengers, is an invasion of the statute. (*Atkin v. The West. R. R. Co.*, 20 N. Y., 370; see, also, 9 Wheaton [U. S.], 1.)

§ 417. Violating condition of recognizance to keep a ferry. — A person who, having entered into a recognizance to

keep and attend a ferry, violates the condition of such recognition, is guilty of a misdemeanor.

2 R. S., 181, § 7; 2 R. L., 210, § 2.

§ 418. **Employment of engineer who cannot read.**—A person who, as an officer of a corporation, or otherwise, knowingly employs as an engineer or engine-driver, to run locomotives or trains on any railway in this state, a person who cannot read the time-tables and ordinary handwriting, is guilty of a misdemeanor.

2 R. S., 534, § 42; Laws 1870, ch. 636, §§ 1, 3.

§ 419. **Person acting as engineer who cannot read.**—A person who, being unable to read the time-tables of the road and ordinary handwriting, acts as an engineer, or runs a locomotive or train on any of the railways in this state, is guilty of a misdemeanor.

2 R. S., 534, § 43; Laws 1870, ch. 636, §§ 2, 3.

§ 420. **Intoxication of persons running trains and boats.** A person who, being employed upon any railway as engineer, conductor, baggage-master, brakeman, switch-tender, fireman, bridge-tender, flagman, signal man, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any of such duties, is guilty of a misdemeanor.

2 R. S., 941, § 39; Laws 1857, ch. 628, § 31; Laws 1871, ch. 560; Code Crim. Proc., § 56.

§ 421. **Failure to ring bell, etc.**—A person, acting as engineer driving a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle, upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing such bell, or sounding such whistle at intervals, until such locomotive, and the train to which the locomotive is attached, shall have completely crossed such road or street, is guilty of a misdemeanor.

2 R. S., 542, § 61; Laws 1850, ch. 140, § 61; Laws 1854, ch. 282.

A company, under the act of 1850, incurs the penalty prescribed as often as they neglect to give the required signal in the prescribed manner. (*People v. N. Y. C. R. R. Co.*, 25 Barb., 199.)

Must give the required signal at each crossing, though the railroad and street are not on same level. (*People v. N. Y. C. R. R. Co.*, 13 N. Y., 78.)

§ 422. Placing passenger car in front of baggage car.—

A person, being an officer or employe of a railway company, who knowingly places, directs, or suffers a baggage, freight, lumber, oil or merchandise car to be placed in rear of a car used for the conveyance of passengers in a railway train, is guilty of a misdemeanor.

2 R. S., 541, § 60; Laws 1850, ch. 140, § 88.

§ 423. Platforms. — A railway company, and any officer or director having charge thereof, and any person managing a railway in this state, or which runs its cars into or through this state, who fails to have the platforms or ends of the passenger cars constructed in such a manner as will prevent passengers falling between the cars when in motion, is guilty of a misdemeanor.

2 R. S., 560, § 143; Laws 1867, ch. 483.

§ 424. Other violations of duty by officers, agents, or servants of railroad companies. — An engineer, conductor, brakeman, switch-tender or other officer, agent or servant of any railway company, who is guilty of any willful violation or omission of his duty as such officer, agent or servant, by which human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

Laws 1867, ch. 483, § 1, in part; see § 199, *ante*.

§ 425. Officers of railroad companies to be uniformed.—

A person who,

1. Advises or induces any one, being an officer, agent or employe of a railway company, to leave the service of such company, because it requires a uniform to be worn by such officer, agent or employe, or to refuse to wear such uniform, or any part thereof; or,

2. Uses any inducement with a person employed by a railway company to go into the service or employment of any other railway company, because a uniform is required to be worn; or,

3. Wears the uniform designated by a railway company without authority;

Is guilty of a misdemeanor.

2 R. S., 584, § 40; 2 R. S., 560, § 143; Laws 1867, ch. 483, § 1.

§ 426. **Riding on freight trains.** — A person who,

1. Rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of the car or engine; or,

2. Who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or,

3. Who willfully obstructs, hinders or delays the passage of any car lawfully running upon any horse or street railway;

Is guilty of a misdemeanor.

Laws 1871, ch. 261; Laws 1879, ch. 474; Laws 1880, ch. 870; see *Carroll v. N. Y. and N. H. R. R. Co.*, 1 Duer, 571, *Coleman v. N. Y. and Harlem R. R. Co.*, 6 id., 382.)

§ 427. **Dangerous exhibitions; bathing.** — A person who, being lessee or occupant of any place of amusement, or any plot of ground or building, uses it or allows it to be used for the exhibition of skill, in throwing any sharp instrument at or toward any human being, or aims or discharges any bowgun, pistol or firearm of any description whatever, or allows one to be aimed or discharged at or towards any human being, or who, being owner, lessee, proprietor or manager of any surf-bathing place, neglects at any time during the bathing season to maintain surf or life boats, or other life-saving apparatus, duly equipped and manned in the manner and to the extent prescribed by law, is guilty of a misdemeanor.

Laws 1879, chs. 227, 328; Laws 1877, ch. 427, § 1.

§ 428. **Fires and lights on vessels in certain counties.** —

A person who violates any of the provisions of an act to prevent conflagrations, passed May 19, 1879, is guilty of a misdemeanor, triable as therein prescribed.

Laws 1879, ch. 824.

§ 429. **Duty of guarding ice cuttings; how long such guards must be maintained; violation of duty to maintain guards around ice cuttings.** — A person or corporation cutting ice in or upon any waters within the boundaries of this state, for the purpose of removing the ice for sale, must surround the cuttings and openings made, with fences of bushes or other guards sufficient to warn all persons of such cuttings and openings. Which fences or guards must be erected at or before the time of commencing the cuttings or openings, and must be

maintained until ice has again formed therein to the thickness of at least six inches. Whoever omits to comply with this section is guilty of a misdemeanor.

7 R. S., 786, § 119; Laws 1867, ch. 549; Laws 1860, ch. 20, § 1; Laws 1879, ch. 888, §§ 1, 3.

§ 430. **Articles in imitation of food.** — A person, who sells or manufactures, exposes or offers for sale as an article of food, any substance in imitation thereof, without disclosing the imitation by a suitable and plainly visible mark or brand, is guilty of a misdemeanor.

Laws 1877, ch. 415.

§ 431. **Noisome or unwholesome substances, etc., in highway.** — A person who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both.

1 R. S., 1108, § 22.

§ 432. **Ambulances.** — A person who willfully stops or obstructs the passage of any ambulance or vehicle used for the transportation of sick or wounded persons or animals upon any public street, highway or place, or who willfully injures the same, or willfully drives any vehicle into collision therewith, is guilty of a misdemeanor. All sheriffs, constables and police officers must, when called upon by the persons in charge of such ambulance or vehicle, aid in placing sick or wounded persons or animals therein and in enforcing the provisions of this section.

Laws 1879, ch. 186, §§ 1, 2.

§ 433. **Using net or weir unlawfully in Hudson river.** — A person who uses any net or weir for setting or attaching nets, or a pole or other fixture in any part of the river Hudson, except as permitted by statute, is guilty of a misdemeanor.

2 R. S., 952, § 40; Laws 1815, p. 148; Laws 1828, p. 309, § 1; 2 Laws 1870, p. 1825, ch. 567; 2 Laws 1871, p. 1669, ch. 721; see *People v. Platt*, 17 John., 195; *Hooker v. Cummings*, 20 id., 90.

§ 434. **Exposing person affected with a contagious disease, in a public place.** — A person who willfully exposes himself or another, affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his necessary removal in a manner not dangerous to the public health, is guilty of a misdemeanor.

See Laws 1850, ch. 824, § 1.

§ 435. **False rumors as to public funds, etc.** — A person who, with intent to affect the market price of the public funds of this state or of the United States, or of any state or territory thereof, or of a foreign country or government, or of the stocks, bonds, or other evidences of debt of a corporation or association, or the market price of gold or silver coin or bullion, or any merchandise or commodity whatever,

1. Without lawful authority, falsely signs the name of an officer of a corporation, or of any other person to a letter, message, or other paper; or,

2. Utters or circulates such a letter, message or paper, knowing that the same has been so falsely signed; or,

3. Knowingly circulates any false statement, rumor, or intelligence;

Is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both.

3 R. S., 947, §§ 51, 52; Laws 1879, ch. 440.

§ 436. **Eaves-dropping.** — A person, who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor.

New.

§ 437. **Destroying invoice.** — A person who willfully destroys or suppresses an invoice, bill of lading or other document, writing or thing whatever, which tends to show the ownership of wrecked property, is guilty of a misdemeanor.

1 R. L., 68, §§ 1, 26.

§ 438. **False labels.** — A person who, with intent to defraud, either

1. Puts upon an article of merchandise, or upon a cask, bottle,

stopper, vessel, case, cover, wrapper, package, band, ticket, label, or other thing, containing or covering such an article, or with which such an article is intended to be sold, or is sold, any false description or other indication of or respecting, the number, quantity, weight or measure of such article, or of any part thereof; or the place or country where it was manufactured or produced; or the quality or grade of any such article, if the quality or grade thereof is required by law to be marked, branded or otherwise indicated on or with such article; or

2. Sells or offers for sale an article, which to his knowledge is falsely described or indicated upon any such package or vessel containing the same, or label thereupon, in any of the particulars specified in this section, in a case where the punishment for such offense is not specially provided for otherwise by statute;

Is guilty of a misdemeanor.

2 R. S., 246, §§ 1-17; Laws 1862, ch. 306, §§ 1, 2, 3; see Code Crim. Proc., § 56; § 580, *post*.

To render a person liable under this section, there must be shown an intent to defraud some person or body corporate by the use of the false label, etc. (*Low v. Hall*, 47 N. Y., 104; see, also, *Mayor, etc., v. Nichols*, 4 Hill, 209; *Rudder v. Huntington*, 3 Sandf., 252; *Brown v. Mercer*, 37 N. Y. Supr., 265.)

Courts of equity will interfere to prevent one person from simulating the label of another, if it is such as is likely to deceive an ordinarily careful person. (*Knight v. Cunningham*, 6 Hun, 106; *Williams v. Spence*, 25 How., 366.)

§ 439. **Skimmed milk.**—A person who sells, or offers for sale, milk from which the whole or part of the cream has been skimmed or removed, without disclosing the fact, or having a mark or label, plainly and legibly stating the fact, conspicuously affixed to every can or vessel containing the same, under circumstances not constituting an offense, for the punishment of which provision is otherwise specially made by statute, is guilty of a misdemeanor.

1 R. S., 1106, § 40; Laws 1878, ch. 220; Laws 1869, ch. 563, § 1; Laws 1865, ch. 638.

(a) **Indictment to aver intent.**—To authorize a conviction under the act to prevent the adulteration, etc., of milk, it must be averred in the indictment that the milk adulterated was designed for sale or exchange. (*People v. Fauerback*, 5 Park., 311.)

(b) **Authority and consent.**—To render a party liable under this section, it must be shown that the offense was committed by his authority or with his knowledge and consent. (*Verona Central Cheese Co. v. Murtaugh*, 50 N. Y., 314.)

His knowledge, however, may be inferred from circumstances. (*Id.*)

§ 440. **Master of vessel bringing foreign convict.** — A person, being the master or commander of any vessel, or boat, arriving from a foreign country, who knowingly brings into this state a person who has been, or is a foreign convict of any offense, which, if committed in this state, would be punishable therein, is guilty of a misdemeanor.

3 R. S., 978, § 67; Laws 1838, ch. 280, § 1.

§ 441. **Non-resident taking or planting oysters.** — A person, who not being at the time an actual inhabitant and resident of this state, plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters or other shell fish from their beds of natural growth, in any such waters on his own account or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both.

Laws 1878, ch. 302; Laws 1879, ch. 87; Laws 1851, ch. 478, § 8; 2 Laws 1866, ch. 753, § 1; Code Crim. Proc., § 56.

Any citizen has a right to acquire property in oysters which he has planted upon a bed distinctly designated by stakes, and where no oysters were growing at the time. (*McCarty v. Holman*, 10 W. D., 501.)

It is a misdemeanor to carry away oysters so planted. (*Id.*)

§ 442. **Use of certain dredges.** — A person who uses a dredge or drag operated by steam, or any dredge or drag weighing over thirty pounds, for the purpose of catching, or taking oysters or other shell fish, in the waters of this state, is guilty of a misdemeanor.

Laws 1878, ch. 302, §§ 2, 3.

§ 443. **Mock auctions.** — A person who buys or sells, or pretends to buy or sell, any goods, wares, or merchandise, or any species of property, except ships, vessels, or real or leasehold estate, exposed for sale by auction, if an actual sale, purchase, and change of ownership therein does not thereupon take place, is guilty of a misdemeanor, punishable by imprisonment for thirty days, or by fine not exceeding one hundred dollars, or both.

2 R. S., 240, § 68; Laws 1853, ch. 138, § 1; § 574, *post*; *Ranney v. People*, 22 N. Y., 418.

§ 444. **Interfering with navigation.** — A person who throws, or causes, or permits to be thrown, from any boat, scow,

or other vessel, or in any other manner, into any of the navigable waters of this state, including bays, sounds and harbors, any earth, ashes, cinders, stone, or other material, or who builds any structure therein, which will in any manner lessen the depth of such waters, or interfere with the free and safe navigation thereof, is guilty of a misdemeanor.

Laws 1880, ch. 463; Laws 1873, ch. 713, § 5; Laws 1875, ch. 236; Laws 1876, ch. 876; Laws 1870, ch. 215; § 390, *ante*.

§ 445. **Maintaining private insane asylums.**—A person who conducts or maintains a private insane asylum, or institution for the care or treatment of persons of unsound mind, without a license issued and granted to such person according to law, is guilty of a misdemeanor.

2 R. S., 450, § 23; *Id.*, 869, § 1; Laws 1873, ch. 571, § 9.

§ 446. **Entry into agricultural fair grounds.**—A person who wrongfully and fraudulently enters any agricultural fair grounds, without paying the entrance fee, is guilty of a misdemeanor.

2 R. S., 775, § 14; Laws 1859, ch. 36, § 2; Laws 1869, ch. 326; see *Magocering v. Staples*, 7 Lans., 145.

§ 447. **Drugging person, etc.**—A person who administers any drug or stupefying substance to another, with the intent, while such person is under the influence thereof, to induce such person to enter the military or naval service of the United States, of this state, or any other state, country or government, is guilty of a misdemeanor.

3 R. S., 951, § 67; Laws 1864, ch. 391, § 2; see § 218, subd. 2, *ante*.

TITLE XIII.

OF CRIMES AGAINST THE PUBLIC PEACE.

SECTION 448. Disturbing lawful meetings.

- 449. "Riot" defined.
- 450. Punishment of riot.
- 451. Unlawful assemblies.
- 452. Disguised and masked persons, etc.
- 453. Allowing masquerades to be held in places of public resort.
- 454. Remaining present at place of riot, etc., after warning.
- 455. Remaining present at a meeting, originally lawful, after it has adopted an unlawful purpose.
- 456. Refusing to assist in arresting rioter.
- 457. Combinations to resist execution of process.
- 458. Prize fighting, aiding therein, etc.
- 459. What is a challenge.
- 460. Betting or stakeholding on fight.
- 461. Fight out of state.
- 462. Indictment.
- 463, 464. Apprehension of persons about to fight.
- 465. Forcible entry and detainer.
- 466. Returning to take possession of lands after being removed by legal process.
- 467. Unlawful intrusion, etc.
- 468. Discharging fire-arms in public places.
- 469. Witness' privilege.

§ 448. **Disturbing lawful meetings.** — A person who, without authority of law, willfully disturbs any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor.

3 R. S., 951, § 67; 2 R. L., 194, § 4; Laws 1824, p. 374; § 274, *ante*.

(a) **Religious meetings.** — Religious public meetings protected by the statute. (*Lindemuller v. People*, 33 Barb., 548; 2 Grant Cas., 406; 58 Ind., 68; 53 Me., 125; *Com. v. Hoxey*, 16 Mass., 385.)

(b) **Town meetings.** — Town meetings for public business also. (16 Mass., 385.)

Also meetings of school directors. (59 Penn. St., 266.)

(c) **Must tend to disturb.** — The natural tendency of the act must be to disturb the assemblage. (28 Ind., 364.)

The disturbance must be willful or designed. (1 Gray, 480.)

§ 449. **"Riot" defined.** — Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with

the power of immediate execution of such threat or attempt, they are guilty of riot.

New in form. (4 Black. Com., 146.)

(a) **Three persons necessary.** — If a crowd of three or more persons make an attack upon, with a preconceived determination to make an assault, and accomplish the unlawful act, and the defendants or any of them participated in the unlawful proceedings, they are guilty of the crime of riot. (*People v. White*, 55 Barb., 606.)

(b) **Previous design unnecessary.** — It requires no previous design or preconcert in order to constitute a riot; concert of action is enough. (*People v. Ferris*, 4 Hall L. J., 209.)

(c) **Mere presence.** — Mere presence at the scene of riot not enough; offender must have taken some active part. (*Scott's case*, 2 C. H. Rec., 25.)

(d) **Riot defined.** — A riot is a tumultuous disturbance of the peace by persons assembled by their own authority, with intent of putting their designs into execution in a violent manner. (6 Blackf., 865; *State v. Brooks*, 1 Hill (S. C.); 361; 5 Ill., 180; 4 Ind., 589; 10 Mass., 518; 3 Rich., 387.)

(e) **Force necessary.** — There must be force or violence or acts tending thereto. (*Com. v. Runnels*, 10 Mass., 518; 11 Ind., 234; 33 Me., 554.)

Any attempt to commit violence. (70 N. C., 66; *State v. Brazil*, 3 Rich., 337; *State v. Cole*, 2 McCord, 117.)

It has been held that the originator of a riot is liable for the whole. (*State v. Blau*, 13 Rich., 93; 3 Cox C. C., 288.)

A police force called together under color of authority not a riotous assemblage. (*Kater v. Wood*, 9 Bosw., 15.)

§ 450. **Punishment of riot.** — A person guilty of riot, or of participating in a riot, either by being personally present, or by instigating, promoting, or aiding the same, is punishable as follows:

1. If the purpose of the assembly, or of the acts done or threatened or intended by the persons engaged, is to resist the enforcement of a statute of this state, or of the United States, or to obstruct any public officer of this state, or of the United States, in serving or executing any process or other mandate of a court of competent jurisdiction, or in the performance of any other duty; or if the offender carries, at the time of the riot, fire-arms or any other dangerous weapon, or is disguised; by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment;

2. In any other case, if the offender directs, advises, encourages, or solicits other persons, present or participating in the riot or assembly, to acts of force or violence, by imprisonment for not

more than two years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment;

3. In any case, not embraced within the foregoing subdivisions of this section, by imprisonment for not more than one year, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

New in form. (See Laws 1845, ch. 3, § 7.)

Riot at common law is a misdemeanor, punishable by fine and imprisonment. (6 Car. & P., 81.)

All who encourage, incite, promote or take part therein are indictable as principals. (*People v. White*, 55 Barb., 606; 33 Me., 496; 11 Metc., 66; 9 Mo., 268.)

Mere presence alone not sufficient. (11 Cox C. C., 330; *Scott's case*, 2 C. H. Rec., 25.)

Women may be guilty of the offense at common law. (3 Ld. Raymond, 1284.) Also a minor. (1 Arch. C. Pr., 18.) But an infant under the age of discretion cannot. (2 Ld. Raym., 1284.)

§ 451. (Amended 1882.) **Unlawful assemblies.**—Whenever three or more persons

1. Assemble with intent to commit any unlawful act by force; or,

2. Assemble, with intent to carry out any purpose, in such a manner as to disturb the public peace; or,

3. Being assembled, attempt or threaten any act tending towards a breach of the peace, or an injury to person or property, or any unlawful act, such an assembly is unlawful, and every person participating therein by his presence, aid or instigation is guilty of a misdemeanor.

But this section shall not be so construed as to prevent the peaceable assembling of persons for lawful purposes of protest or petition.

Laws 1845, ch. 3, § 1; 4 Black. Com., 146.

A police force collected for a certain purpose under color of authority, though unlawful, does not amount to an unlawful assembly.

The collection of a crowd in a public street to listen to a temperance lecture is an unlawful assembly. (*Falconer v. Steers*, 3 Luz. L. Obs., 163.)

§ 452. **Disguised and masked persons, etc.**—An assemblage in public houses or other places of three or more persons disguised by having their faces painted, discolored, colored or concealed, is unlawful, and every individual so disguised, present thereat, is guilty of a misdemeanor; but nothing contained in

this section shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment, or any assemblage therefor of persons masked, or as prohibiting the wearing of masks, fancy dresses, or other disguise by persons on their way to or returning from such ball or other entertainment; if, when such masquerade, fancy dress ball or entertainment is held in any of the cities of this state, permission is first obtained from the police authorities in such cities respectively for the holding or giving thereof, under such regulations as may be prescribed by such police authorities.

1 Laws 1876, ch. 3; Laws 1845, ch. 3, § 6.

§ 453. Allowing masquerades to be held in places of public resort. — A person being a proprietor, manager or keeper of a theater, circus, public garden, public hall, or other place of public meeting, resort or amusement, for admission to which any price or payment is demanded, who permits therein any assemblage of persons masked, prohibited in this title, is guilty of a misdemeanor, punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars and not less than one thousand dollars, or by both such fine and imprisonment.

Laws 1829, ch. 270, amending Laws 1853, ch. 359; Laws 1876, ch. 1, amending Laws 1845, ch. 3.

§ 454. Remaining present at place of riot, etc., after warning. — A person, remaining present at the place of an unlawful assembly or riot, after the persons assembled have been warned to disperse by a magistrate or public officer, is guilty of a misdemeanor, unless as a public officer, or at the request or command of a public officer, he is endeavoring or assisting to disperse the same, or to protect persons or property, or to arrest the offenders.

New. (See Code Crim. Proc., § 106.)

§ 455. Remaining present at place of a meeting, originally lawful, after it has adopted an unlawful purpose. — Where three or more persons assemble for a lawful purpose, and afterwards proceed to commit an act that would amount to a riot, if it had been the original purpose of the meeting, every person

who does not retire when the change of purpose is made known, or such act is committed, except public officers and persons assisting them in attempting to disperse the assembly, is guilty of a misdemeanor.

See Laws 1845, ch. 3, §§ 2, 3; 2 R. S. (Edm.), 460, § 82.

§ 456. **Refusing to assist in arresting rioter.** — A person, present at the place of an unlawful assembly or riot, who, being commanded by a duly authorized public officer to act or aid in suppressing the riot, or in protecting persons or property, or in arresting a person guilty of or charged with participating in the unlawful assembly or riot, neglects or refuses to obey such command, is guilty of a misdemeanor.

New in form. (See 2 R. S. [Edm.], 460, § 82; Code Crim. Proc., § 108.

§ 457. **Combinations to resist execution of process.** — A person, who enters into a combination with another to resist the execution of any legal process, or other mandate of a court of competent jurisdiction, under circumstances not amounting to a riot, is guilty of a misdemeanor.

3 R. S., 979, § 75; 2 R. S. (Edm.), 460, §§ 81-83; Code Crim. Proc., §§ 102, 103.

§ 458. **Prize fighting, aiding therein, etc.** — A person who, within this state, engages in, instigates, aids, encourages or does any act to further a contention or fight without weapons between two or more persons, or a fight commonly called a ring or prize fight, either within or without the state, or who sends or publishes a challenge or acceptance of a challenge for such a contention or fight, or carries or delivers such a challenge or acceptance, or trains or assists any person in training or preparing for such a contention or fight, is guilty of a misdemeanor.

3 R. S., 968, § 8; Laws 1856, ch. 98, § 1; Laws 1860, ch. 141; see § 234, *ante*.

An affray is a fighting in a public place by mutual consent to the terror of the people. (8 Dana, 295; 5 Humph., 519; 5 Yerg., 356; 18 Ga., 322; 53 Ala., 640; 10 Mass., 518.)

The place of fighting must be public. (31 Ala., 218; 18 Ga., 322; 8 Humph., 84; 22 Ind., 206.)

§ 459. **What is a challenge.** — Any words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply a desire, request, invitation or demand to engage in any fight, such as is mentioned in section

four hundred and fifty-eight, are to be deemed a challenge within the meaning of that section.

See Laws 1828, p. 431, § 2; 2 R. S. (Edm.), 708, § 2; see § 284, *ante*.

It is the province of the jury to determine whether the writing was intended as a challenge. (*Wood's case*, 3 C. H. Rec., 139.)

What constitutes a challenge to fight a duel and its effect. (*Barker v. People*, 3 Cow., 386; 20 Johns., 457; *People v. Barker*, 2 Wh. Cr. C., 19; *Norton's case*, 3 C. H. Rec., 90.)

§ 460. Betting or stake-holding on fight.—A person who bets, stakes, or wagers money or other property upon the result of such a fight or encounter, or who holds or undertakes to hold money or other property so staked or wagered, to be delivered to or for the benefit of the winner thereof, is guilty of a misdemeanor.

New.

§ 461. Fight out of state.—A person who leaves the state, with intent to elude any provision of this title, or to commit any act without the state which is prohibited by this title, or who, being a resident of this state, does any act without the state which would be punishable by the provisions of this title, if committed within the state, is guilty of the same offense and subject to the same punishment, as if the act had been committed within this state.

3 R. S., 963, § 5; 2 R. S. (Edm.), 708, § 5; Laws 1816, ch. 4, § 5; see §§ 185; 239, *ante*; Code Crim. Proc., § 133.

§ 462. Indictment.—An indictment for an offense, specified in the last section, may be tried in any county within the state.

3 R. S., 963, § 6; see § 240, *ante*; Code Crim. Proc., § 133.

§ 463. Apprehension of persons about to fight.—A magistrate having power to issue warrants in criminal cases, to whom it is made to appear that there is reasonable ground to apprehend that an offense specified in sections four hundred and fifty-eight, four hundred and sixty and four hundred and sixty-one is about to be committed within his jurisdiction, or by any person being within his jurisdiction, must issue his warrant to a sheriff or constable, or other proper officer, for the arrest of the person or persons so about to offend. Upon a person being arrested and brought before him by virtue of the warrant, he must inquire into the matter, and if it appears that there is rea-

sonable ground to believe that the person arrested is about to commit any offense, the magistrate must require him to give a bond to the people of the state in such a sum, not exceeding one thousand dollars, as the magistrate may fix, either with or without sureties in his discretion, conditioned that such person will not, for one year thereafter, commit any such offense.

New in form. (3 R. S., 963, § 9; Laws 1859, ch. 37, § 2; also Laws 1856, ch. 98, § 2.)

§ 464. **Apprehension of persons about to fight.** — If the person arrested, as prescribed in the last section, does not furnish a bond as prescribed therein, within a time fixed by the magistrate, the latter must commit him to the county jail, there to remain until discharged by a court of record having criminal jurisdiction. A person so committed may, at any time, be discharged upon a writ of *habeas corpus*, upon his executing the bond required by the committing magistrate. If the bond is required to be given with one or more sureties, the surety or sureties must be approved by the officer taking the same.

3 R. S., 963, § 9; Laws 1859, ch. 37, § 2; also Laws 1856, ch. 98, § 2.

(a) **What constitutes.** — To constitute a forcible entry and detainer, force is necessary; a naked trespass not sufficient. (*People v. Smith*, 24 Barb., 16; *People v. Field*, 1 Lans., 222; *State v. Pearson*, 2 N. H., 550.)

(b) **Peaceable possession.** — Any person in the peaceable possession of the lands at time of a forcible entry may proceed under the statute. (*People v. Van Nostrand*, 9 Wend., 50; *People v. Carter*, 29 Barb., 208.)

A party in possession may use force to repel an attempt to dispossess him without process. (*Mickle's case*, 1 C. H. Rec., 96; *Mickle v. Edwards*, 1d., 119.)

(c) **Seizure or possession.** — An indictment must aver a seizure or possession on part of complainant. (*People v. Shaw*, 1 Cal., 125; *People v. Reed*, 11 Wend., 157; *People v. Leonard*, 11 Johns., 504; *Carter v. Neubold*, 7 How., 166; *People v. Field*, 52 Barb., 198; 58 id., 270; 1 Lans., 222.)

An averment of lawful possession is sufficient. (*People v. Reed*, 11 Wend., 157.)

A defendant may controvert the title of the prosecutor. (*People v. Godfrey*, 1 Hall, 240; *People v. Rickert*, 8 Cow., 226; *People v. Wilson*, 13 How., 446.)

(d) **Detainer only.** — On an indictment for forcible entry and detainer the defendant may be convicted of detainer only. (*People v. Anthony*, 4 Johns., 198; *People v. Rickert*, 8 Cow., 226; *People v. Godfrey*, 1 Hall, 240; *Matthews v. Ferstell*, 8 Leg. Inst., 22.)

§ 465. **Forcible entry and detainer.** — A person guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or

other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor.

3 R. S., 820, § 1.

§ 466. Returning to take possession of lands after being removed by legal process. — A person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards, without authority of law, returns to settle or reside upon or take possession of such lands, is guilty of a misdemeanor.

1 R. S., 600, § 67; 2 R. S. (Edm.), 523, § 2; 1 R. L., 96, § 2.

§ 467. Unlawful intrusion, etc. — A person who intrudes upon any lot or piece of land within the bounds of the city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever, without such authority; and a person who places, erects or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor.

3 R. S., 984, § 109; see § 640, subd. 9, *post*.

§ 468. Discharging fire-arms in public places. — A person who willfully discharges any species of fire-arms, air-gun or other weapon, or throws any other deadly missile in any public place, or in any place where there is any person to be endangered thereby, although no injury to any person shall ensue, is guilty of a misdemeanor.

New.

§ 469. Witness' privilege. — No person shall be excused from giving evidence upon an investigation or prosecution for any of the offenses specified in this title, upon the ground that the evidence might tend to convict him of a crime. But such evidence shall not be received against him upon any criminal proceeding.

3 R. S., 964, § 12; see § 712, *post*.

TITLE XIV.

OF CRIMES AGAINST THE REVENUE AND PROPERTY OF THE STATE.

SECTION 470. Misappropriation, etc., and falsification of accounts by public officers.

- 471. Other violations of laws.
- 472. Misappropriation, etc., by county treasurer.
- 473. Officer authorized to make any sale, lease or contract, becoming interested under it.
- 474. County clerks omitting to publish statement required by law.
- 475. Obstructing officer in collecting revenue.
- 476. Delivering false bill of lading to canal collector.
- 477. Weighmaster making false entry of weight of canal boat.
- 478. Canal officer concealing frauds upon the revenue.
- 479. Willful injuries to the canals.
- 480. Drawing off water from canals.
- 481. Canal officer accepting bribe to allow water to be drawn off from canals.
- 482. Fraudulent appropriation of lost treasure, or waived property.
- 483. Injuries to the salt works.
- 484. Seizing military stores belonging to the state.
- 485. Making false statement in reference to taxes.

§ 470. **Misappropriation, etc., and falsification of accounts by public officers.** — A public officer, or a deputy, or clerk of any such officer, and any other person receiving money on behalf of, or for account of the people of this state, or of any department of the government of this state, or of any bureau or fund created by law, and in which the people of this state are directly or indirectly interested, or for or on account of any city, county, village or town, who

1. Appropriates to his own use, or to the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, clerk or deputy, or otherwise; or,

2. Knowingly keeps any false account, or makes any false entry or erasure in any account of, or relating to, any money so received by him, or,

3. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or,

4. Willfully omits or refuses to pay over to the people of this state or their officer or agent authorized by law to receive the same, or to such city, village, county or town, or the proper officer

or authority empowered to demand and receive the same, any money received by him as such officer when it is his duty imposed by law to pay over, or account for, the same;

Is guilty of felony.

1 R. S., 549, § 28; 2 R. S., 54, § 26; see § 114, subd. 2, *ante*; § 515, *post*.

§ 471. Other violations of law. — An officer or other person mentioned in the last section who willfully disobeys any provision of law regulating his official conduct, in cases other than those specified in that section is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding two years, or both.

Id.

§ 472. Misappropriation, etc., by county treasurer. — A county treasurer, who willfully misappropriates any moneys, funds or securities, received by or deposited with him as such treasurer, or who is guilty of any other malfeasance or willful neglect of duty in his office, is punishable by a fine not less than five hundred dollars nor more than ten thousand dollars, or by imprisonment in a state prison not less than one year or more than five years, or by both such fine and imprisonment.

Laws 1875, ch. 605; Laws 1877, ch. 436, § 8, amended.

§ 473. Officer authorized to make any sale, lease or contract, becoming interested under it. — A public officer, who is authorized to sell or lease any property, or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, is guilty of a misdemeanor.

Laws 1860, ch. 488; Laws 1861, ch. 340; Laws 1863, ch. 285.

Held, that the sale of defendant's property under sale on execution to plaintiff's attorney is not a sale absolute to said attorney, but in trust for the respective parties. (*People v. Baker*, 3 Johns. Ch., 117.)

§ 474. County clerks omitting to publish statement required by law. — A county clerk who willfully omits to publish any statement required by law, within the time prescribed, is guilty of a misdemeanor, punishable by a fine of one hundred dollars, or imprisonment for six months, or both.

New.

§ 475. **Obstructing officer in collecting revenue.**—A person who willfully obstructs or hinders a public officer from collecting any revenue, taxes or other sum of money in which, or in any part of which the people of this state are directly or indirectly interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

New.

§ 476. **Delivering false bill of lading to canal collector.** A person whose duty it is to deliver to any collector of tolls upon any of the canals belonging to this state, a bill of lading of any property transported upon such canal, who delivers a false bill of lading as true, or makes or signs a false bill of lading, intending it to be delivered as true, knowing such bill to be false, is punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding three times the value of the property omitted in such bill, or both.

1 R. S., 892, §§ 293-297; Laws 1827, p. 220, § 1.

Any person who delivers a false bill of lading as true, knowing it to be false, is liable in treble damages under the statute. (*Davis v. Bemis*, 40 N. Y., 453, note.)

§ 477. **Weighmaster making false entry of weight of canal boat.**—A weighmaster upon any of the canals belonging to this state, and a clerk of such weighmaster, who makes a false entry of the weight of any boat, or cargo of any boat, navigating such canal, or who makes a false certificate of the light weight of any boat, knowing such entry or certificate to be false, is guilty of a misdemeanor.

Laws 1861, ch. 124, § 4.

§ 478. **Canal officer concealing frauds upon the revenue.** A public officer or agent employed by the people of this state in relation to the canals belonging to this state, who knows, or has good reason to believe that any fraud upon the revenues of the canals has been committed or attempted, and who omits to disclose the same, and enforce the penalties therefor, if within his power, is guilty of a misdemeanor.

Laws 1855, ch. 584, § 4.

§ 479. **Willful injuries to the canals.**—A person who, without authority of law, willfully inflicts an injury upon any of

the canals belonging to this state, or disturbs or injures any of the boats, locks, bridges, buildings, machinery or other works or erections connected with any such canal, and in which the people of this state have an interest, is guilty of felony.

1 R. S., 700, §§ 366-369; see Code Crim. Proc., § 56.

A person does not incur any penalty by driving upon the tow-path of the canal. (*Smith v. Clark*, 3 Lans., 208.)

§ 480. Drawing off water from canals.—A person who draws water from any canal in this state, or from a feeder or reservoir of any canal, during the season of navigation of the canal, and to the detriment or injury of the navigation thereof, without authority of law, is punishable by imprisonment in a county jail not less than one year, and by a fine not less than one thousand dollars.

1 R. S., 685, § 252; Laws 1860, ch. 213, § 5.)

No person, except by authority of the legislature, or of the authorized agents of the state, has a right to tap the state dam, and draw off the waters of the artificial pond which is created by such dam for public purposes. (*Varick v. Smith*, 5 Paige, 136; see, also, *Robinson v. Chamberlain*, 84 N. Y., 400; *Lynch v. Stone*, 4 Den., 356; *Ex parte Müller*, 2 Hill, 418.)

§ 481. Canal officer accepting bribe to allow water to be drawn off from canals.—A public officer or agent employed by the people of this state in relation to the canals belonging to the state, or a contractor for canal repairs, or person having charge of any canal, or any part thereof, or of any lock, waste-weir, feeder or other work belonging thereto, or being employed thereon, who asks, or accepts or promises to accept any bribe as an inducement to permit water to be drawn from a canal, feeder or reservoir in violation of the last section; and a person who gives, or offers or promises to give to any officer or person above mentioned, any bribe as an inducement to him to permit water to be drawn from any canal, feeder or reservoir in violation of this section, is guilty of a misdemeanor.

1 R. S., 699, § 359; Laws 1879, ch. 403; Laws 1860, ch. 213, § 5.

§ 482. Fraudulent appropriation of lost treasure, or waived property.—A person who fraudulently conceals or appropriates to his own use any lost treasure or any waived property belonging to this state by virtue of its sovereignty, is guilty of a misdemeanor.

New.

§ 483. **Injuries to the salt works.**—A person who willfully burns, destroys, or injures any salt manufactory connected with the Onondaga salt springs, or any building appurtenant to such manufactory or any part of such manufactory, or any of the buildings, reservoirs, pumps, conductors or water conduits, belonging to this state, used in the raising of salt water for the manufacture of salt, without authority of law, is punishable by imprisonment in a state prison not exceeding five years.

Laws 1859, ch. 846, §§ 62, 144.

§ 484. **Seizing military stores belonging to the state.**
A person who enters any fort, magazine, arsenal, armory, arsenal yard or encampment, and seizes or takes away any arms, ammunition, military stores or supplies belonging to the people of this state; and a person who enters any such place with intent so to do, is punishable by imprisonment in a state prison not exceeding ten years.

3 R. S., 979, § 74.

§ 485. **Making false statement in reference to taxes.**—
A person who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully makes, as to any material matter, any statement which he knows to be false, is guilty of a misdemeanor.

1 R. S., 979, § 3.

TITLE XV.

OF CRIMES AGAINST PROPERTY.

CHAPTER 1. ARSON.

- II. Burglary and housebreaking.
- III. Forgery and counterfeiting.
- IV. Larceny, including embezzlement.
- V. Extortion.
- VI. False personation and cheats.
- VII. Fraudulently fitting out and destroying ships and vessels.
- VIII. Fraudulent destruction of property insured.
- IX. False weights and measures.
- X. Fraudulent insolvencies by individuals.
- XI. Fraudulent insolvencies by corporations, and other frauds in their management.
- XII. Frauds in the sale of passage tickets.
- XIII. Frauds relative to documents of title to merchandise.
- XIV. Malicious mischief.

CHAPTER I.

ARSON.

- SECTION 486. Arson in first degree defined.
- 487. Arson in second degree.
- 488. Arson in third degree.
- 489. Arson, how punished.
- 490. Intent to destroy building requisita.
- 491. Contiguous buildings.
- 492. "Night-time" defined.
- 493. "Building" defined.
- 494. "Inhabited building" defined.
- 495. Ownership of building.

§ 486. **Arson in first degree defined.** — A person who willfully burns, or sets on fire, in the night-time, either,

1. A dwelling-house in which there is, at the time, a human being; or,

2. A car, vessel, or other vehicle, or a structure or building other than a dwelling-house, wherein, to the knowledge of the offender, there is, at the time, a human being;

Is guilty of arson in the first degree.

3 R. S., 929, § 9; Id., 989, § 1; 2 R. S. (Edm.), 678, § 9; 1 R. L., 407, § 1; Laws 1873, ch. 644; 4 Black. Com., 221.

(a) **Dwelling-house defined.** (See § 502, *post*.)

Setting fire to a building usually occupied by persons lodging therein is

arson in the first degree, though not a dwelling-house in the ordinary acceptance of the term. (*People v. Orcut*, 1 Park., 252.)

It is arson in the first degree that the occupant of the house was present therein when the house took fire, though previously aroused by the alarm. (*Woodford v. People*, 3 Hun, 310.)

(b) **Adjoining building.**—Where fire is communicated to an adjoining building, a party may be indicted for firing the latter. (*Hennessey v. People*, 21 How., 239.)

Setting fire to an inhabited dwelling-house is arson, though only a part of it be consumed. (*People v. Butler*, 16 Johns., 203; 4 C. H. Rec., 77.)

(c) **The value of the property** is not an element. (52 Ala., 345.)

(d) **Owner's dwelling.**—Arson in the first degree to burn one's own dwelling. (*Shepherd v. People*, 19 N. Y., 537; overruling *People v. Henderson*, 1 Park., 560; *Ball's case*, 2 C. H. Rec., 85; *People v. Smith*, 3 How., 226; *State v. Hurd*, 58 N. H., 176; *Com. v. Van Schaack*, 16 Mass., 105; *State v. Sandy*, 5 Ired., 570; *Ree v. Parker*, 9 Carr. & P., 45.)

(e) **Firing jail**, in order to effect escape, not arson. (*McGary v. People*, 43 N. Y., 153; reversing 2 Lans., 227; *People v. Cotteral*, 18 Johns., 115.)

(f) **Attempt to burn a house** is a misdemeanor at common law. (*Orr's case*, 5 C. H. Rec., 81.)

Also under statute. (*People v. Bush*, 4 Hill, 133; *McDermott v. People*, 5 Park., 102; *Mackeskey v. People*, 6 id., 114.)

(g) **Indictment.**—Form and sufficiency of allegations. (*People v. Gates*, 15 Wend., 159; *People v. Van Blaricum*, 2 Johns., 105; *Woodford v. People*, 3 Hun, 310; 5 S. C., 539; *People v. Durkin*, 5 Park., 243; *Dedieu v. People*, 23 N. Y., 178; *Freund v. Parker*, 5 Park., 198; *Morrill v. People*, 7 Alb. L. J., 171.)

(h) **Dwelling of tenant** is well described as his dwelling, though the owner occupy part of it. (*People v. Henderson*, 1 Park., 560.)

Where the prisoner fired a single house, and thirty-five were destroyed, he is properly indicted for firing the whole. (*Woodford v. People*, 3 Hun, 310.)

A charge that the house burned was the property of a person named is a sufficient allegation of ownership. (*Woodford v. People*, 62 N. Y., 117.)

(i) **Malice and willfulness** are essential elements. (28 Miss., 100; 49 Ala., 27; 51 Cal., 320; *People v. Cotteral*, 18 Johns., 115.) Not necessarily a design to produce death. (53 Miss., 384; *People v. Henderson*, 1 Park., 560.)

(j) **Building defined.**—Any edifice capable of affording shelter for a human being is a building. (51 Cal., 320; 34 id., 245; 12 Cox C. C., 106.) A church or school-house is within the statute. (1 Leach, 318.)

§ 487. Arson in second degree. — A person who,

1. Commits an act of burning in the day-time, which, if committed in the night-time, would be arson in the first degree; or,

2. Willfully burns, or sets on fire, in the night-time, a dwelling-house wherein at the time there is no human being; or,

3. Willfully burns, or sets on fire, in the night-time, a building not inhabited, but adjoining or within the curtilage of an inhabited building, in which there is, at the time, a human being, so

that the inhabited building is endangered, even though it is not in fact injured by the burning ; or,

4. Willfully burns, or sets on fire, in the night-time, a car, vessel, or other vehicle, or a structure or building, ordinarily occupied at night by a human being, although no person is within it at the time ;

Is guilty of arson in the second degree.

3 R. S., 939, § 2; 2 R. S. (Edm.), 686, §§ 1, 2.

(a) **Contiguity necessary.**—To convict of arson in second degree it is necessary that the building set on fire actually touched an inhabited dwelling, or that it was within the curtilage thereof. (*Peeverelley v. People*, 3 Park., 59.

(b) **May be convicted, though evidence show a higher grade.**—A prisoner may be convicted of arson in second degree under an indictment charging that offense, though the facts would have justified a conviction of a higher grade of crime under an indictment properly framed. (*People v. Durkan*, 5 Park., 248.)

§ 488. **Arson in third degree.**—A person who willfully burns, or sets on fire, either,

1. A vessel, car, or other vehicle, or a building, structure, or other erection, which is at the time insured against loss or damage by fire, with intent to prejudice the insurer thereof ; or,

2. A vessel, car, or other vehicle, or a building, structure, or other erection, under circumstances not amounting to arson in the first or second degree ;

Is guilty of arson in the third degree.

3 R. S., 939, §§ 3, 9; 2 R. S. (Edm.), 686, §§ 3, 4, 5; Laws 1862, p. 370, ch. 197, § 10; Laws 1873, ch. 644.

(a) **Insurance must be averred.**—To convict of arson in the third degree, it must be averred that the house was insured against loss by fire, and that the offense was committed with intent to defraud the insurers. (*People v. Henderson*, 1 Park., 560; *Sheppard v. People*, 19 N. Y., 537.)

(b) **Third degree—first degree.**—Under an indictment for arson in first degree there can be no conviction of arson in third degree. (*Dedieu v. People*, 22 N. Y., 178, reversing 4 Park., 593, and overruling *Hennessey v. People*, 21 How., 239.)

(c) **Intent to defraud insurance company.**—Otherwise, however, if it be shown that the prisoner actually set fire to the house with intent to defraud the insurer. (*Freund v. People*, 5 Park., 198; see *McGary v. People*, 45 N. Y., 158.)

§ 489. **Arson, how punished.**—Arson is punishable as follows :

1. In the first degree, by imprisonment for not less than ten years.

2. In the second degree, by imprisonment for not less than seven nor more than fifteen years;

3. In the third degree, by imprisonment for not more than seven years.

8 R. S., 940, § 10; Laws 1873, ch. 644, amending Laws 1862, ch. 197, § 7.

§ 490. **Intent to destroy building requisite.** — The burning of a building under circumstances which shows beyond a reasonable doubt that there was no intent to destroy it, is not arson.

New. (2 R. S. [Edm.], 687, § 1.)

Setting fire to a jail by a prisoner in order to effect an escape is not a willful burning of an inhabited dwelling. (*People v. Cotteral*, 18 Johns., 115.)

Malice and willfulness necessary ingredients. (28 Miss., 100; 49 Ala., 27; 5 Iredell, 350.)

Need not be a design to produce death. (53 Miss., 384; 15 Wis., 13; 3 Chil. C. L., 1120; 32 Vt., 158.)

Intent must be malicious. (28 Miss., 100; 2 East P. C., 1033.) Or to injure or defraud. (32 Cal., 160; 78 N. C., 552; *Sheppard v. People*, 19 N. Y., 537.)

It need not be to injure or defraud any particular person. (L. R., 1 C. C., 844.)

The intent may be inferred from the facts. (51 Cal., 468; 52 Ala., 345; 51 Ga., 612; 63 Me., 128; 12 La. An., 882; 119 Mass., 354; 10 Met., 422; 41 Texas, 598; 47 Ill., 538.)

§ 491. **Contiguous buildings.** — Where an appurtenance to a building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing provisions, against any person actually participating in the original setting on fire, as of the moment when the fire from the one communicates to and sets on fire the other.

3 R. S., 939, § 2.

If a person sets fire to a building which communicates to an adjoining one, he may be convicted of firing the latter. (*Hennessey v. People*, 21 How. Pr., 239; overruled on other grounds in 22 N. Y., 178.)

Where the prisoner set fire to a house, and thirty-five were burned, he was properly indicted for firing all. (*Woodford v. People*, 3 Hun, 310; 62 N. Y., 117.)

To convict of arson in the second degree it must be shown that the building touched another, or was within the curtilage thereof. (*Peverley v. People*, 3 Park., 59; see, also, *Roberts' case*, 2 East P. C., 1030; *Isaac's case*, Id., 1031; *Rex v. Pelley*, Leach C. C., 277; *Rex v. Fletcher*, 2 Car. & K., 215; 2 Russ., 550; *State v. McLaughlin*, 8 Jones, 354; *People v. Taylor*, 2 Mich., 250.)

§ 492. **"Night-time" defined.** — The words "night-time," as used in this chapter, include the period between sunset and

sunrise, and every building or structure, which shall have been usually occupied by persons lodging therein at night, is a dwelling-house within the meaning of this chapter.

New. A building used by persons for lodging purposes is a dwelling-house within the statute. (*People v. Orcutt*, 1 Park., 252; *People v. Henderson*, 1 Park., 560; 4 Ga., 339.)

A jail is an inhabited dwelling. (*People v. Cotteral*, 18 Johns., 115; 41 Texas, 601; 5 Iredell, 350; 53 Ga., 33.)

§ 493. "**Building**," defined. — Any house, vessel, or other structure, capable of affording shelter for human beings, or appurtenant to, or connected with a structure so adapted, is a "building" within the meaning of this chapter.

New. Any edifice capable of affording shelter to human beings is a building. (51 Cal., 320; 34 id., 245; *State v. Johnson*, 48 Ga., 116.) It need not be finished. (12 Cox C. C., 106.) Its state of completeness is a question of fact. (1 Met., 258; 12 Cox C. C., 106.) The remains of a wooden house after a fire is not a building. (23 Up. Can. Q. B., 429.)

A church building or school-house are within the statute. (1 Leach, 318; 2 Root, 516; 4 Gill & J., 402; *State v. O'Toole*, 29 Conn., 349.)

In arson, house, shop and workshop have the same meaning as in burglary. (5 Up. Can. Q. B. [O. S.], 522; *Com. v. Barney*, 10 Cush., 478.)

§ 494. "**Inhabited building**," defined. — A building is deemed an "inhabited building" within the meaning of this chapter, any part of which has usually been occupied by a person lodging therein at night.

New. A lodging house is an inhabited building. (*People v. Orcutt*, 1 Park., 252; *Hooker v. Com.*, 13 Gratt., 763; *Comm. v. Barney*, 10 Cush., 478; *Rea v. Donovan*, Leach C. C., 81; *Rea v. Connor*, 2 Cox C. C., 65.)

A jail is an inhabited dwelling. (*People v. Cotteral*, 18 Johns., 115; 41 Texas, 601; 5 Iredell, 350; 53 Ga., 33.)

§ 495. **Ownership of building.** — To constitute arson it is not necessary that another person than the defendant should have had ownership in the building set on fire.

New. A person may be guilty of arson in burning his own buildings. (*Sheppard v. People*, 19 N. Y., 537; *People v. Van Blaricum*, 2 Johns., 105; *People v. Smith*, 3 How., 226; *State v. Taylor*, 45 Me., 323.)

CHAPTER II.

BURGLARY.

- SECTION 496. Burglary in first degree defined.
 497. Burglary in second degree.
 498. Burglary in third degree.
 499. "Break" defined.
 500. "Night-time" defined.
 501. "Enter" defined.
 502. "Dwelling-house" defined.
 503. Dwelling-houses, etc., when deemed separate.
 504. "Building" defined.
 505. Unlawfully entering building.
 506. Burglar punishable separately for crime in building.
 507. Burglary, how punished,
 508. Possessing burglar's instruments, etc.

§ 496. **Burglary in first degree defined.** — A person who, with intent to commit some crime therein, breaks and enters, in the night-time, the dwelling-house of another, in which there is at the time a human being,

1. Being armed with a dangerous weapon ; or,
2. Arming himself therein with such a weapon ; or,
3. Being assisted by a confederate actually present ; or,
4. Who, while engaged in the night-time in effecting such entrance, or in committing any crime in such a building, or in escaping therefrom assaults any person ;

Is guilty of burglary in the first degree.

3 R. S., 940, § 11; 2 R. S. (Edm.), 688, § 10; 1 Wharton Cr. L., § 758; 4 Black. Com., 227; *Com. v. Newell*, 7 Mass., 247; *Cole v. People*, 37 Mich., 544.

(a) **Burglary defined.** — The offense of burglary consists in breaking and entering with intent to commit a felony. (*People v. Marks*, 4 Park., 153; 52 Cal., 454; 7 Mass., 247; 1 Coxe [N. J.], 441; 37 Mich., 544; 9 W. Va., 456.)

Attempt at burglary indictable at common law. (12 Cox C. C., 155; 9 id., 98; 6 Phila., 805.)

(b) **Breaking defined.** — There must be a breaking, actual or constructive. (1 Coxe [N. J.], 439; 82 Penn. St., 306; 25 Gratt., 908; *State v. Boon*, 13 Iredell, 244; *Lyons v. People*, 68 Ill., 271; *Com. v. Strupney*, 105 Mass., 588.)

(c) **Inner door.** — It is a breaking where an inner door of a tenement house is broken, the outer one being open. (*Mason v. People*, 26 N. Y., 200; *People v. Bush*, 3 Park., 552; 20 Iowa, 418; 13 Iredell, 344; *State v. Wilson*, Coxe [N. J.], 439; *State v. Scripture*, 42 N. H., 485.)

(d) **Outer door.** — Opening an outer door which is only latched is burglary at common law, but is not burglary in first degree under the statute. (*People v. Bush*, 3 Park., 552; 1 Coxe [N. J.], 439.)

(f) **Very slight force** will constitute a breaking, as lifting a latch. (1 Hale P. C., 552.) If the door be closed, need not be latched. (13 Iredell, 244; 20 Iowa, 418; *McCourt v. People*, 64 N. Y., 588.)

(g) **Removing fastening** of an inner door in night-time with felonious intent sufficient. (*Smith's case*, 4 C. H. Rec., 62.)

(h) **The raising of a window**, with like intent, sufficient. (*People v. Edwards*, 1 Wh. C. C., 371; *Frank v. State*, 39 Miss., 705; 5 Texas Ct. App., 74; 7 Carr. & P., 441; *Dennis v. People*, 27 Mich., 151.)

(i) **Even though unfastened**. — Russ. & R., 450; 1 Moody C. C., 377.

So, also, by entering through a chimney or other unusual place. (*Robertson's case*, 4 C. H. Rec., 63; 36 Ala., 281; 42 Texas, 276; 53 Ala., 376; *Com. v. Stephenson*, 8 Pick., 354; *State v. Willis*, 7 Jones, 190.)

By the removal of a loose plank or through a grating. (*People v. Nolan*, 22 Mich., 229; *Com. v. Trimmer*, 1 Mass., 476.)

(j) **Closed door**. — The opening of a closed door, though neither bolted, locked nor fastened, for the purpose of stealing, is burglary. (*Tickner v. People*, 6 Hun, 637.)

It is burglary to break into a bar-room which is parcel of a dwelling-house. (*Quinn v. People*, 11 Hun, 836; 71 N. Y., 561; *People v. Snyder*, 2 Park., 23.)

(k) **Breaking out**. — It is burglary to break out of a house which has been entered with intent to steal. (*Sand's case*, 6 C. H. Rec., 1.)

(l) **Intent**. — The intent is always a material element of the crime. (*State v. Bell*, 29 Ia., 816; 16 Cal., 481; 46 Ga., 322; 48 Ala., 684.)

And must be proved. (*People v. Marks*, 4 Park., 153; 11 N. H., 269; 16 Vt., 551.)

And must be felonious. (12 Serg. & R., 177; 14 Ill., 497.)

§ 497. Burglary in second degree. — A person who, with intent to commit some crime therein, breaks and enters the dwelling-house of another in which there is a human being, under circumstances not amounting to burglary in the first degree, is guilty of burglary in the second degree.

3 R. S., 940, §§ 12-16; 2 R. S. (Edm.), 688, 689, §§ 11-15.

Entering the dwelling-house of another in the day-time through an open window, with a felonious intent, is not burglary in the second degree, unless there is a breaking out in the night-time (*People v. Arnold*, 6 Park., 638.)

§ 498. Burglary in third degree. — A person who either,

1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or,

2. Being in any building, commits a crime therein and breaks out of the same;

Is guilty of burglary in the third degree.

3 R. S., 941, §§ 18, 19.

(a) **Breaking out**. — It is burglary to break out of a house which a thief has entered in the night-time with intent to steal. (*Sand's case*, 6 C. H. Rec., 1.)

(b) **Merely entering not sufficient.** — Merely entering not sufficient; there must also be a breaking out. (*People v. Arnold*, 6 Park., 638.)

(c) **Storehouse.** — Breaking and entering a storehouse with a felonious intent is burglary in third degree. (*People v. McCoskey*, 5 Park., 57.)

(d) **Indictment.** — An indictment in the third degree need not state that the offense was committed in the day-time. (*Butler v. People*, 4 Den., 68.)

(e) **Breaking defined.** — What is such a breaking and entering as amounts to burglary in the third degree. (*People v. Myers*, 2 Hun, 61; 4 S. C., 292.)

§ 499. **"Break" defined.** — The word "break," as used in this chapter, means and includes,

1. Breaking or violently detaching any part, internal or external of a building; or,

2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or,

3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof.

8 R. S., 941, §§ 20, 21; 1 Wharton's Crim. Law, § 759.

(a) **Opening an outer door which is only latched.** (*People v. Bush*, 3 Park., 552; 1 Hale P. C., 552.)

(b) **Unlatching a cellar door.** — *McCourt v. People*, 64 N. Y., 583.

(c) **Breaking an inner door with felonious intent.** (*Smith's case*, 4 C. H. Rec., 62.)

(d) **Law of other states.** — Raising a window-sash sufficient. (*People v. Edwards*, 1 Wh. C. C., 371; 39 Miss., 705; 7 Car. & P., 441; 1 Russ. & R., 450.) Although kept down only by its own weight. (1 Moody C. C., 377; 20 Iowa, 413.)

Where a door is tightly closed, it is a breaking to open it, though neither locked or latched. (*Ticknor v. People*, 6 Hun, 657; 13 Iredell, 244; 20 Iowa, 413.)

To enter by a chimney or in any unusual way is a breaking. (*Robertson's case*, 4 C. H. Rec., 63; 36 Ala., 281; 43 Texas, 276; 53 Ala., 376; 8 Pick., 354; *People v. Fralick*, Lator, 63.)

Or through an open window. (*People v. Arnold*, 6 Park., 638.)

Constructive breaking may be committed by the use of threats, or by artifice or fraud. (43 Ala., 17; 18 Ind., 386; 68 N. C., 207; 1 Leech, 406.)

Or by artifice or fraud, as in procuring the door to be opened by ringing the bell. (85 Penn. St., 54.)

(c) **Breaking defined.**—What is such a breaking and entering as amounts to burglary. (*People v. Myers*, 2 Hun, 6.)

What amounts to an attempt to commit burglary. (*People v. Lawton*, 56 Barb., 126.)

§ 500. "**Night-time**" defined.—The words "night-time," in this chapter, include the period between sunset and sunrise.

New. (See § 492, *ante*.)

§ 501. "**Enter**" defined. — The word "enter," as used in this chapter, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

New. (4 Black. Com., 297.)

An entering is necessary, but the least entry is sufficient. (5 Tex. Ct. App., 74; Russ. & R. C. C., 499; 2 East P. C., 487.)

It is not necessary that the whole body enter. (4 Ala., 643.)

A hand inserted to unlatch a window. (43 Ala., 717; 4 Car. & P., 747; 4 Cox C. C., 898; 2 East P. C., 490.)

But merely breaking a shutter and not getting through the pane of glass not sufficient. (4 Ala., 643.)

Thrusting an arm through a broken pane is an entry. (1 Moody C. C., 377.)

§ 502. "**Dwelling-house**" defined. — A building, any part of which is usually occupied by a person lodging therein at night, is, for the purposes of this chapter, deemed a dwelling-house.

8 R. S., 941, § 17; 2 R. S. (Edm.), 689, § 16.

A bar-room under the same roof with a dwelling, and connected with it, is a dwelling-house. (*Quinn v. People*, 11 Hun, 336; 71 N. Y., 561.)

What amounts to a dwelling-house. (*People v. Snyder*, 2 Park., 23; *Mills' case*, 3 C. H. Rec., 192; *People v. Parker*, 4 Johns., 424; *People v. McCloskey*, 5 Park., 57.)

§ 503. **Dwelling-houses, etc. ; when deemed separate.**— If a building is so constructed as to consist of two or more parts, intended to be occupied by different tenants usually lodging therein at night, each part is deemed the separate dwelling-house of a tenant occupying the same. If a building is so constructed as to consist of two or more parts occupied by different tenants

separately for any purpose, each part or apartment is considered a separate building within the meaning of this chapter.

3 R. S., 941, § 17; 2 R. S. (Edm.), 689, § 16.

In a tenement house severed by a lease into distinct habitations, each room or suite of rooms occupied by a tenant is his dwelling house, and a door of such room is an outer door, so that a breach of it is burglary. (*Mason v. People*, 26 N. Y., 200; *People v. Bush*, 3 Park., 552.)

§ 504. "**Building,**" **defined.** — The term "building," as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure.

New. (See § 498, *ante*.)

§ 505. **Unlawfully entering building.** — A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor.

New.

§ 506. **Burglar punishable separately for crime in building.** — A person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime, separately, or in the same indictment.

New.

§ 507. **Burglary, how punished.** — Burglary is punishable by imprisonment in a state prison, as follows:

1. Burglary in the first degree, for not less than ten years;
2. Burglary in the second degree, for not more than ten nor less than five years;
3. Burglary in the third degree, for not more than five years, nor less than one year.

3 R. S., 941, § 22; 2 R. S. (Edm.), 689, § 21; 1 R. L., 406, § 8; Laws 1868, ch. 244.

§ 508. **Possessing burglar's instruments, etc.** — A person who is found having in his possession any pick-lock, false key, bit, nippers, or other instrument adapted or commonly used for the commission of burglary, or larceny, being in or about a building, or in the night-time, or otherwise under circumstances evinc-

ing an intent to use the same in the commission of a crime, is guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony.

3 R. S., 955, § 95; Laws 1862, ch. 374, § 1.

What is sufficient evidence to connect the prisoner with the ownership of a set of burglar's tools. (*Foster v. People*, 3 Hun, 6; 5 S. C., 670; 63 N. Y., 619.)

CHAPTER III.

FORGERY.

SECTION 509. Forgery in first degree defined.

- 510. Forgery; false certificate to certain instruments.
- 511. Forgery in second degree.
- 512. Qualification of last section.
- 513. Other cases of forgery in second degree.
- 514. 515. Other cases of forgery in third degree.
- 516. Forging passage tickets.
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- 520. Terms "forge," and "forging," generally, defined.
- 521. Uttering, etc., forged instruments, etc., is forgery.
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- 523. Forgery in first degree, how punished.
- 524. Forgery in second degree.
- 525. Forgery in third degree.
- 526. Having possession of counterfeit coin.
- 527. Advertising counterfeit money.

§ 509. Forgery in first degree defined.—A person is guilty of forgery in the first degree who with intent to defraud, forges,

1. A will or codicil of real or personal property, or the attestation thereof, or a deed or other instrument, being or purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or affected; or,

2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or purporting to have been made by a court or officer duly authorized to make such a certificate; or,

3. A certificate, bond, paper writing, or other public security,

issued or purporting to have been issued by or under the authority of this state, or of the United States, or of any other state or territory of the United States, or of any foreign government, country or state, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority ; or,

4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest ; or,

5. A certificate of stock, bond or other writing, bank-note, bill of exchange, draft, check, certificate of deposit, or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this state, or of the United States, or of any other state, government or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty or obligation ; or,

6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.

3 R. S., 942, §§ 23, 24; 2 R. S. (Edm.), 690, §§ 22, 23.

(a) **Forgery defined.**— Forgery is the fraudulent making or alteration of a writing to the prejudice of another's rights. (35 Cal., 507; 4 Up. Can. Pr., 216; 2 Leach, 775; 5 Ark., 349; 8 Iowa, 281.) It is the making of an instrument purporting to be that which it is not. (10 Low. Can. Jur., 236; 11 Gray, 197.)

(b) **Forged letter.**— To write an instrument fraudulently over the signature of another, which, if true, would be to his prejudice, is forgery. (*Martine's case*, 6 C. H. Rec., 27; 1 Hale P. C., 683.)

(c) **Mark.**— Even a mark made in the name of another is a forgery. (1 Leach, 57.)

(d) **Letter of request.**— Forging a letter of request is not the forgery of an order for the payment of money. (*People v. Thompson*, 2 Johns. Cases, 342; *Dobb's case*, 6 C. H. Rec., 61.)

The passing of a forged check, payable in current bank notes, not a forgery at common law. (*Wood's case*, 2 C. H. Rec., 46.) The forgery of a note not

payable in money is but a misdemeanor at common law. (*Atherton's case*, 1 C. H. Rec., 159.)

What is an order for the delivery of money or goods which is the subject of forgery within the statute. (*People v. Shaw*, 5 Johns., 236; *People v. Farrington*, 14 id., 348; *Dobb's case*, 6 C. H. Rec., 61; *Harris v. People*, 9 Barb., 664.)

(e) **Want of capacity.** — The name forged need not represent a person of legal capacity. (*People v. Krummer*, 4 Park., 217; 1 Sheld., 549.)

(f) **Want of authority.** — It is not forgery if the accused honestly believed he had lawful authority to affix the name of another to the instrument in question. (*Parmalee v. People*, 8 Hun, 628; *People v. Rathbone*, 21 Wend., 509.)

(g) **County notes.** — Notes signed and issued by a county treasurer without authority are not forgeries. (*Mann v. People*, 15 Hun, 155; 19 Alb. L. J., 28; 75 N. Y., 484.)

The instrument forged must purport to be the act of another. (*Id.*)

(h) **Invalid note.** — An instrument invalid on its face does not constitute a forgery. (*Cunningham v. People*, 4 Hun, 455; *People v. Shale*, 9 Cow., 778; *People v. Harrison*, 8 Barb., 560.)

(i) **Forged note.** — The making of a promissory note with intent to defraud is a forgery, though the name of the pretended maker be a fictitious one. (*Brown v. People*, 8 Hun, 562; 120 Mass., 358; 5 Ala., 747.)

Evidence tending to show that such a note had been paid or secured is inadmissible. (*Id.*)

(j) **Insurance policies.** — If an insurance agent, intrusted with policies signed in blank, fill out and issue a policy with intent to defraud, after the person insured has been killed, it is forgery. (*People v. Graham*, 1 Sheld., 151; 6 Park., 135.)

(k) **Deed of lands.** — The forgery of a deed to lands lying in another state is indictable here. (*People v. Flanders*, 18 Johns., 163.)

Putting a forged deed on record is a sufficient uttering. (*Paige v. People*, 6 Park., 683; 3 Abb. Dec., 439.)

(l) **Notes or orders.** — When forgeries under the statute. (*Heath's case*, 2 C. H. Rec., 54; *Noakes v. People*, 25 N. Y., 380; 5 Park., 291; *People v. Finch*, 1 Wend., 198; *People v. Rathbun*, 21 Wend., 509.)

(m) **Own name.** — A man may be guilty of forgery by signing his own proper name. (*People v. Peacock*, 6 Cow., 72.)

(n) **Railway pass.** — Or by forging a railway pass. (Sec. 516, *post*, and *Com. v. Ayer*, 8 Cush., 150.)

(o) **Municipal corporation.** — A note purporting to have been issued by a municipal corporation, and to have been signed by its agent, is not a subject of forgery. (*Conner's case*, 4 C. H. Rec., 59.)

(p) **Bank notes.** — Notes of a bank may be forged, even if there be no such bank. (12 Up. Can. Q. B., 543; 40 id., 219.) Or if it be of a denomination not yet issued. (30 Mo., 236; 2 Head., 591; 2 Har. [N. J.], 327; 12 Serg. & R., 237; 4 Penn. St., 210.)

The mere prohibition of the circulation of bank bills does not prevent them from being subjects of forgery. (9 Ohio St., 354.)

A bank note promising to pay the bearer a certain sum out of the joint funds of the association, is a subject of forgery. (*Knapp's case*, 6 C. H. Rec.,

18; *Marshall's case*, Id., 23; *Wade's case*, 2 id., 461; *People v. Peabody*, 26 Wend., 472; *Dennis v. People*, 1 Park., 469.)

§ 510. Forgery ; false certificate to certain instruments.

An officer authorized to take the proof or acknowledgment of an instrument which by law may be recorded, who willfully certifies falsely that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree.

3 R. S., 943, § 28; 2 R. S. (Edm.), 691, § 27.

Putting a forged deed on record, or averring it as genuine in a pleading, is a sufficient uttering. (*Paige v. People*, 6 Park., 683; 3 Abb. Dec., 439.)

§ 511. Forgery in second degree. — A person is guilty of forgery in the second degree who, with intent to defraud,

1. Forges the great or privy seal of this state, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this state, or of the United States, or of any other state or any territory of the United States, or of any other state, government or country, or any impression of such a seal; or any gold or silver coin, whether of the United States or of any foreign state, government or country; or,

2. Forges a record of a will, conveyance, or instrument of any kind, the record of which is by the law of this state made evidence, or of any judgment, order, or decree of any court or officer, or a certified or authenticated copy thereof; or,

A judgment roll, judgment, order, or decree of any court or officer, or an enrollment thereof, or a certified or authenticated copy thereof, or any document or writing purporting to be such judgment, order, decree, enrollment, or copy; or,

An entry made in any book of record or accounts, kept by or in the office of any officer of this state, or of any village, city, town, or county of the state, by which any demand, claim, obligation, or interest, in favor of or against the people of the state, or any city, village, town or county, or any officer thereof, is or purports to be created, increased, diminished, discharged, or in any manner affected; or an entry made in any book of records or accounts kept by a corporation doing business within the state, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished, discharged, or in any manner affected; or,

An instrument, document, or writing, being or purporting to be, a process or mandate issued by a competent court, magistrate, or officer of the state, or the return of an officer, court or tribunal, to such a process or mandate; or a bond, recognizance, undertaking, pleading, or proceeding, filed or entered in any court of the state, or a certificate, order or allowance by a competent court, or officer, or a license or authority granted pursuant to any statute of the state or a certificate, document, instrument, or writing, made evidence by any law or statute; or,

An instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged, or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, the punishment for forging, altering, or counterfeiting which is not hereinbefore prescribed, by which false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured in his person or property; or,

3. Makes or engraves a plate in the form or similitude of a promissory note, bill of exchange, bank note, draft, cheque, certificate of deposit, or other evidence of debt, issued by a banker, or by any banking corporation or association, incorporated or carrying on business under the laws of the state, or of the United States, or of any other state or territory of the United States, or of any foreign government, or country, without the authority of such banker, or banking corporation or association; or,

Without like authority, has in his possession or custody such a plate, with intent to use, or permit the same to be used, for the purpose of taking therefrom any impression to be uttered; or,

Without like authority, has in his possession or custody any impression taken from such a plate, with intent to have the same filled up and completed for the purpose of being uttered; or,

Makes or engraves, or causes to be made or engraved, upon any plate, any figures or words, with intent that the same may be used for the purpose of falsely altering any evidence of debt hereinbefore mentioned.

3 R. S., 943, §§ 25, 26, 29, 30, 31, 33, 34, 35; 2 R. S. (Edm.), 691, §§ 26, 27, 30, 31.

(a) **An attorney.**—Where an attorney fraudulently alters a writ, he is guilty of forgery. (*People v. Cady*, 6 Hill, 490.)

A note with forged indorsement is an offense. (*People v. Rathbun*, 21 Wend., 509.)

(b) **Deed of foreign lands.**— *People v. Flanders*, 18 Johns., 163; *State v. Benham*, 7 Conn., 414; *Barton v. State*, 23 Wis., 587.

A constable's account against a bank may be a subject of forgery. (*Rosekrans v. People*, 3 Hun, 887; 5 S. C., 467.)

(c) **Fictitious names.**— *Grant's case*, 3 C. H. Rec., 142; *Riley's case*, 5 id. 87; *Golobed's case*, 6 id., 25; Russ. & R. C. C., 209.

(d) **Forgery over genuine signature.**— *Martine's case*, 6 C. H. Rec., 27.

(e) **Forged orders for delivery of money or goods.** (*People v. Shaw*, 5 Johns., 236; *People v. Farrington*, 14 id., 348; *Dobbs' case*, 6 C. H. Rec., 61; *Harris v. People*, 9 Barb., 664; *Heath's case*, 2 C. H. Rec., 54; *Noakes v. People*, 25 N. Y., 380; 5 Park., 291; 2 Cranch C. C., 294; 11 Ga., 92.)

(f) **Accepted orders.**— *People v. Fitch*, 1 Wend., 198.

(g) **Injury.**— In all cases injury is the gist of the crime. (*People v. Fitch*, 1 Wend., 198; *People v. Cady*, 6 Hill, 490; *Cunningham v. People*, 4 Hun, 455; *People v. Krummer*, 4 Park., 217; *People v. Tomlinson*, 35 Cal., 503; *State v. Gherkin*, 7 Iredell, 206; *State v. Kimball*, 50 Me., 409; *Perdue v. State*, 2 Humph., 494; *State v. Smith*, 8 Yerg., 150.)

(h) **One's own name.**— It is a forgery to sign one's own name to a bill of lading made to another of the same name and obtain money on it. (*People v. Peacock*, 6 Cow., 72.)

(i) **Power of attorney** to receive a pension not subject of forgery. (*Scholtz's case*, 4 C. H. Rec., 163.)

(j) **Due-bill.**— May be the subject of forgery. (*People v. Finch*, 5 Johns., 287.)

(k) **Invalid instrument.**— Forgery of an instrument void on its face indictable. (*People v. Shale*, 9 Cow., 778; *People v. Harrison*, 8 Barb., 560; *Cunningham v. People*, 4 Hun, 455; *Connor's case*, 3 C. H. Rec., 59.)

(l) **A forged indorsement** to a note is indictable. (*People v. Rathbun*, 21 Wend., 509.)

And the proof of one of several forged indorsements to the same note is sufficient. (Id.; *Powell v. Com.*, 11 Gratt., 22; 28 Cal., 507; 2 Cranch C. C., 521.)

(m) **Forged check.**— Where a certified check is forged it is sufficient to prove the forged certification. (*People v. Clements*, 26 N. Y., 193, reversing 5 Park., 387.)

The forgery need not be identical with the original. (*People v. Omer*, 4 Park., 242.)

It is sufficient if it be calculated to deceive. (Id.; 11 Cush., 481; 10 Ind., 872; 7 Pick., 137.)

(n) **Counterfeiting coin.**— *Reswick v. Com.*, 2 Va. Cas., 511; *Sanabria v. People*, 11 N. Y. W. Dig., 492.

(o) **Promissory note.**— On the trial of an indictment for forging a promissory note, it cannot be shown that the note has been paid or is secured. (*Brown v. People*, 8 Hun, 562.)

§ 512. **Qualification of last section.** — A plate, specified in the last section, is in the form and similitude of the genuine instrument imitated, if the finished parts of the engraving thereupon resemble and conform to similar parts of the genuine instruments.

3 R. S., 943, § 32.

(a) **Exact similitude.**—Exact similitude is not required, even in the operative words of the instrument. It is enough that there be resemblance enough to convince the jury that the plate or design was intended to be used in striking off false bills to be used as true ones. (*People v. Omer*, 4 Park., 242; 1 Sheld., 583; *Quinn's case*, 6 C. H. Rec., 63.)

(b) **Must be such as to deceive.**—Resemblance must be such as to deceive an ordinary person. (11 Cush., 481; 10 Ind., 372; 7 Pick., 137.)

§ 513. **Other cases of forgery in second degree.** — An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association or an officer thereof, is a written instrument or a writing, within the provisions of this chapter.

3 R. S., 946, § 46; 2 R. S., 695, § 45.

Bank notes wholly printed or engraved are the subjects of forgery. (*People v. Rhoner*, 4 Park., 166; 8 Gray, 441; 8 Cox C. C., 32.)

Writing includes everything done with a pen, by engraving or by printing. (8 Gray, 441; 8 Cox C. C., 32.)

Also by pasting a name over another's. (1 Har. [Del.], 507; 7 Cox C. C., 494.)

§ 514. **Other cases of forgery in third degree.** — A person who, being an officer, or in the employment of a corporation, association, partnership, or individual, falsifies, or unlawfully and corruptly alters, erases, obliterates, or destroys any accounts, book of accounts, record, or other writing, belonging to, or appertaining to the business of, the corporation, association, partnership, or individual, is guilty of forgery in the third degree.

3 R. S., 945, § 36; 2 R. S., 693, § 34; Laws 1874, ch. 440.

It is forgery in the third degree to make a false entry in a ledger under the prisoner's control, as clerk in a public office, for the purpose of defrauding. (*People v. Phelps*, 49 How., 462; 6 Hun, 428; *Sanabria v. People*, 11 N. Y. W. D., 492.)

§ 515. **Other cases of forgery in third degree.** — A person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, either,

1. Alters, erases, obliterates, or destroys an account, book of

accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or,

2. Makes a false entry in any such account or book of accounts; or,

3. Willfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction;

Is guilty of forgery in the third degree.

3 R. S., 944, § 35; 2 R. S. (Edm.), 693, §§ 34, 35, 43, 47; Laws 1874, ch. 440; § 114, *ante*.

False entries in a ledger, etc. (*People v. Phelps*, 49 How., *supra*; *Biles v. Com.*, 82 Penn., 529.)

§ 516. **Forging passage tickets.** — A person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, cheque or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railway or in any vessel or other public conveyance; and a person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

3 R. S., 954, §§ 93, 94; Laws 1860, p. 177, ch. 103; *Com. v. Ayer*, 3 Cush., 150.

§ 517. **Forging United States stamps.** — A person who forges, counterfeits or alters any postage or revenue stamp of the United States, or who sells, or offers, or keeps for sale, as genuine or as forged, any such stamp, knowing it to be forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

New.

§ 518. **Officer of corporation selling, etc., shares.** — An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who willfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writ-

ing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

3 R. S., 946, §§ 49, 50; § 591, *post*.

§ 519. Falsely indicating person as corporate officer. — The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, state or government.

3 R. S., 946, § 48; 2 R. S. (Edm.), 695, § 47; Laws 1855, ch. 155.

§ 520. Terms “forge,” and “forging.” — The expressions “forge,” “forged” and “forging,” as used in this chapter, include false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several genuine instruments.

3 R. S., 946, § 44.

§ 521. Uttering, etc., forged instruments, etc., is forgery. A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, either,

1. A forged seal or plate, or any impression of either; or,
2. A forged coin; or,
3. A forged will, deed, certificate, indorsement, record, instrument or writing, or other thing, the false making, forging, or altering of which is punishable as forgery;

Is guilty of forgery in the same degree as if he had forged the same.

3 R. S., 945, §§ 37, 38, 39; 2 R. S. (Edm.), 694, §§ 37, 38, 39.

(a) **Uttering.**— Putting a forged deed on record or averring it to be genuine is a sufficient uttering. (*Paige v. People*, 6 Park., 683; 3 Abb. Dec., 439.)

The making of a counterfeit order for the delivery of goods in the name of a third person is an uttering under the statutes. (*Noakes v. People*, 25 N. Y., 880; see, also, *Gallagher's case*, 5 C. H. Rec., 1; *Chahoon v. Com.*, 20 Gratt., 773; *Sands v. Com.*, Id., 800; *People v. Ah Who*, 28 Cal., 205; *People v. Brigham*, 2 Mich., 550; *U. S. v. Nelson*, 1 Abb., 135.)

On the trial of an indictment for uttering a note with several forged indorsements, it is sufficient to prove any one of them to be a forgery. (*People v. Rathbun*, 21 Wend., 509.)

So, also, of uttering a forged certified cheque, proof of forgery of certification sufficient. (*People v. Clements*, 26 N. Y., 198.)

§ 522. Uttering writing signed with wrong-doer's name.— Whenever the false making or uttering of any instrument or writing is forgery in any degree, a person is guilty of forgery in the same degree, who, with intent to defraud, offers, disposes of, or puts off such an instrument or writing subscribed or indorsed in his own name, or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or indorsement is the act of another person of the same name, or of a person not in existence.

3 R. S., 945, § 42; 2 R. S. (Edm.), 695, § 41.

§ 523. Forgery in first degree, how punished.— Forgery in the first degree is punishable by imprisonment for not less than ten years.

3 R. S., 946, § 43; 2 R. S. (Edm.), 695, § 42, subd. 1.

§ 524. Forgery in second degree.— Forgery in the second degree is punishable by imprisonment for not more than ten nor less than five years.

3 R. S., 946, § 43; 2 R. S. (Edm.), 946, § 43, subd. 2.

§ 525. Forgery in third degree.— Forgery in the third degree is punishable by imprisonment for not more than five years.

3 R. S., 946, § 43; 2 R. S. (Edm.), 946, § 43, subd. 3.

§ 526. Having possession of counterfeit coin.— A person who has in his possession a counterfeit of any gold or silver coin,

whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

8 R. S., 945, § 39.

(a) **Innocent reception.** — Though a man innocently receive a counterfeit note, if he afterward pass it, knowing it to be spurious, he is guilty. (*Gallagher's case*, 5 C. H. Rec., 1.)

(b) **Possession.** — Having possession of a counterfeit with intent to sell it, is an offense against the statute. (*Moess' case*, 2 C. H. Rec., 84; *Murphy's case*, 4 id., 42; *Dorsett's case*, 5 id., 77.)

Where more than one counterfeit is found in possession of a person but one prosecution can be sustained thereon. (*Lampier's case*, 5 C. H. Rec., 79.)

(c) **Must be calculated to deceive.** — It is sufficient to convict that the counterfeit coin be so far finished as to be calculated to deceive. (*Quinn's case*, 6 C. H. Rec., 93.)

Where party has a die in his possession. (*Murphy's case*, 4 C. H. Rec., 42; *Dorsett's case*, 5 id., 77.)

Party engaged in coining counterfeit money at time of his arrest. (*Weaver's case*, 2 C. H. Rec., 57.)

§ 527. **Advertising counterfeit money.** — A person who with intent to defraud, prints, circulates, or distributes a letter, circular, card, pamphlet, handbill, or any other written or printed matter, offering or purporting to offer for sale, exchange, or as a gift, counterfeit coin or paper money, or giving or purporting to give information where counterfeit coin or paper money can be procured, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

8 R. S., 933, § 99; 1 Laws 1873, ch. 441.

CHAPTER IV.

LARCENY, INCLUDING EMBEZZLEMENT, OBTAINING PROPERTY BY FALSE PRETENSES, AND FELONIOUS BREACH OF TRUST.

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§ 528. **Larceny defined.** — A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either,

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or

take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

Steals such property, and is guilty of larceny.

3 R. S., 953, § 78-81; 3 R. S., 952, §§ 73-77; 2 R. S. (Edm.), 699, § 63.

(a) **Intent.** — To constitute the crime of larceny there must not only be a wrongful taking, but also a felonious intent. (*Jeffers' case*, 1 C. H. Rec., 88; *Orocheron's case*, Id., 177; *Cochran's case*, 6 id., 62; *McCourt v. People*, 64 N. Y., 588.)

The felonious intent is to be deducted from all the circumstances of the taking. (*Bartron's case*, 6 C. H. Rec., 56; *People v. Ward*, 1 Wh. Cr. Cas., 397.)

The question of felonious intent is for the jury. (*Ellis v. People*, 21 How. Pr., 356.)

If a prisoner, in an attempt to steal a certain article, be caught in the act, and through alarm accidentally carry away another, he cannot be convicted of stealing it. (*Hadley's case*, 5 C. H. Rec., 8.)

(b) **Asportation.** — To constitute larceny there must be an asportation. (*Phillips' case*, 4 C. H. Rec., 177; *State v. Wisdom*, 8 Porter, 511; *State v. Jones*, 65 N. C., 395.)

The least removal of the property from its place of deposit is a sufficient asportation. (*Scott's case*, 5 C. H. Rec., 169; *Harrison v. People*, 50 N. Y., 518.)

Where a thief put his hand into a pocket and lifted the pocket-book about three inches in an attempt to steal it; *held*, a sufficient asportation. (*Harrison v. People*, 50 N. Y., 518.)

(c) **What constitutes larceny.** — It is larceny for a wife's paramour to carry off the husband's goods through the solicitation of the wife. (*People v. Schuyler*, 6 Cow., 572; *People v. Cole*, 43 N. Y., 508; *Reg. v. Flatman*, 21 Alb. L. J., 404, 418.)

To counsel an apprentice to steal his master's goods, renders both liable as principals if the theft be accomplished. (*People v. Sheahan*, 1 Wh. Crim. C., 226.)

To cut and carry away lead from the roof of a house is larceny. (*John's case*, 8 C. H. Rec., 58.)

No defense to larceny that the crime was committed in the commission of a burglary. (*People v. Smith*, 57 Barb., 46.)

(d) **Stealing one's own property.** — A man may be convicted of stealing his own property from a constable who had levied upon it under an execution. (*Palmer v. People*, 10 Wend., 165), or of stealing from one who himself had acquired the goods feloniously. (*Ward v. People*, 3 Hill, 395; 6 id., 144.)

(e) **Grand larceny.** — There can be no conviction for grand larceny unless the prisoner stole more than twenty-five dollars laid in one count. (*Hughes' case*, 4 C. H. Rec., 132; *McKenna's case*, 5 id., 174.)

The prisoner is entitled to have the jury instructed whether or not the offense proved amount to grand larceny. (*Williams v. People*, 24 N. Y., 406; *Rhodian v. People*, 5 Park., 395.)

Under the act of 1862, stealing from the person was grand larceny, regardless of the amount or time of the stealing. (*Fulton v. People*, 2 Keyes, 145; 2 Abb. Dec., 83; 6 Park., 256.)

(f) **Petit larceny** is still a felony as at common law, for which the offender may be arrested without warrant.

Under the Revised Statutes a man who steals abroad and brings it into this state may be convicted here. (*People v. Burke*, 11 Wend., 129.)

Larceny from a dwelling-house is local in its nature; otherwise of larceny from a ship or vessel. (*People v. Honeyman*, 3 Den., 121.)

(g) **Accessories.**—There are no accessories in petit larceny. (*Ward v. People*, 3 Hill, 395.) An accessory before the fact to a larceny is not indictable as a principal. (*Norton v. People*, 8 Cow., 137.)

(h) **Subjects of larceny.**—A dog is the subject of larceny under the act of 1857. (*People v. Campbell*, 4 Park., 386; *People v. Maloney*, 1 Park., 593.)

So, also, is ice stored for domestic use. (*Ward v. People*, 3 Hill, 395.)

Also bank bills, though not yet issued. (*People v. Wiley*, 3 Hill, 194.)

Or notes on a foreign bank. (*People v. Jackson*, 8 Barb., 637.)

An indictment will lie for the larceny of a note payable in specific articles. (*People v. Bradley*, 4 Park., 245.)

And for the certificates of the stock of an incorporated company; but their value must be proved. (*People v. Griffin*, 38 How., 475.)

A chose in action is not the subject of larceny. (*Lennenden's case*, 1 C. H. Rec., 30.)

An undrawn lottery ticket is not the subject of larceny. (*Healy's case*, 4 C. H. Rec., 36.)

Animals *feras naturæ*, not unless confined or killed. (*Norton v. Ladd*, 5 N. H., 203; *State v. House*, 65 N. C., 315.)

A letter of no intrinsic value is not the subject of larceny. (*Payne v. People*, 6 Johns., 103.)

Neither is a receipt for money. (*People v. Bradley*, 4 Park., 245; *People v. Griffin*, 38 How., 475; *People v. Loomis*, 4 Denio, 380.)

A draft sent to the state comptroller, though not indorsed by the latter, is the subject of larceny. (49 How., 437; 6 Hun, 401; 72 N. Y., 334.)

(i) **Indictments.**—Where a number of articles belonging to different persons are stolen at the same time, only a single indictment will lie. (*Shourf's case*, 2 C. H. Rec., 37.)

The property in the goods must be laid in the one who holds the legal interest. (*People v. Romaine*, 1 Wh. Cr. C., 369.)

The property may be laid in a surviving partner, and the executors of a deceased partner, without naming the latter. (*Ridgway's case*, 1 C. H. Rec., 3.)

One cannot be convicted of stealing goods the ownership of which is laid in himself and another. (*Van Cleef's case*, 5 C. H. Rec., 117.)

It is sufficient to lay the goods as the property of a bailee. (*People v. Smith*, 1 Park., 329.)

Where goods assigned for the benefit of creditors are stolen the property must be laid in the assignee. (*Veitch's case*, 5 C. H. Rec., 4.)

An indictment for stealing a promissory note must conform strictly to the requirements of the statute. (*People v. Cook*, 2 Park., 12.)

An indictment charging the taking and carrying away of a bill of exchange,

fully describing it, is good without any averment that the money was due thereon. (*Phelps v. People*, 6 Hun, 401; 72 N. Y., 334.)

(j) Evidence.—The ownership of goods must be proved as laid. (*Mahan's case*, 3 C. H. Rec., 44.)

Even if described with unnecessary particularity. (*Alkenbrach v. People*, 1 Den., 80.)

To convict of stealing bank bills, received as good by the prosecutor, their value need not be otherwise shown. (*Hughs' case*, 4 C. H. Rec., 133; *People v. Fallon*, 6 Park., 256.)

If the bank bills are foreign, there must be at least "*prima facie*" evidence of the existence of such banks and the genuineness of the bills. (*People v. Caryl*, 12 Wend., 547; *Johnson v. People*, 4 Den., 384; *Higgins v. People*, 7 Lans., 110.)

The possession of stolen property immediately after the theft is sufficient to convict the defendant of stealing it, unless explained. (*Riley's case*, 1 C. H. Rec., 23; *Armstead's case*, Id., 174; *Salé's case*, 5 id., 178; *People v. Preston*, 1 Wh. C. C., 141; *Knickerbocker v. People*, 48 N. Y., 177; 57 Barb., 865; *Dillon v. People*, 1 Hun, 670; 4 S. C., 203.)

Where part only is found that is sufficient to charge with the whole if stolen at the same time. (*Collins' case*, 4 C. H. Rec., 139.)

The presumption of guilt arising from the possession of stolen property recently after the theft is one of fact, and not of law. (*Storer v. People*, 56 N. Y., 315.)

(k) Constructive larceny.—To constitute a constructive larceny there must be a felonious intent at the time the prisoner obtains possession of the goods. (*Hisroth's case*, 5 C. H. Rec., 137; *Wilson v. People*, 39 N. Y., 459; *Stone's case*, 2 C. H. Rec., 157.)

Obtaining goods by fraudulent purchase, the vendor delivering them with an intent to part with the property, is not larceny. (*Mowrey v. Walsh*, 8 Cow., 238; *Andrew v. Dieterich*, 14 Wend., 81; *Ross v. People*, 5 Hill, 294.)

Fraudulently to obtain possession of goods under pretense of a purchase, with an intent at the time wrongfully to deprive the owner of the property, is larceny. (*O'Terre's case*, 3 C. H. Rec., 154; *Valentine's case*, 4 id., 33; *Bowen's case*, Id., 46; *People v. Curtis*, 1 Wh. Cr. Cas., 536; *St. Valerie v. People*, 64 Barb., 426; *People v. McMurray*, 4 Park., 234; *Wixson v. People*, 5 id., 119; *Smith v. People*, 58 N. Y., 111.)

If the prisoner, "*animo furandi*," fraudulently obtain the prosecutor's property from his agent, it is larceny. (*People v. McDonald*, 43 N. Y., 61.)

Where the prisoner obtains goods by a trick or fraud, it is larceny. (*People v. Jackson*, 3 Park., 590; *Weyman v. People*, 4 Hun, 511; 62 N. Y., 623; *Macino v. People*, 12 Hun, 127.)

Hiring a horse and carriage with intent to convert the property is larceny. (*Brannan's case*, 1 C. H. Rec., 50.)

If a note be handed to a maker for the purpose of indorsing a payment, and he feloniously convert it, he is guilty of larceny. (*People v. Call*, 1 Den., 120; *Hildebrand v. People*, 56 N. Y., 394; 1 Hun, 19; 3 S. C., 83.)

If a debtor induce a creditor to sign a receipt, under pretense of paying a debt, and keep the receipt with criminal intent, it is a felony. (*People v. Loomis*, 4 Den., 380.)

If personal property be left, through inadvertence, with another, and he

conceal it "*animo furandi*," it is larceny. (*People v. McGarren*, 17 Wend., 460.)

But a *bona fide* finder of a lost article is not guilty of larceny. (*People v. Anderson*, 14 Johns., 294.)

Not so, however, if the finder knows the owner. (*People v. Swan*, 1 Park., 9.)

Or have the means of identifying him instantan at the time of the finding. (*People v. Cogdell*, 1 Hill, 94; *People v. Kaats*, 3 Park., 129; *Nichols v. People*, 17 N. Y., 114.)

The felonious appropriation of property swept from the deck of a vessel in a gale is larceny. (*Dayton's case*, 2 C. H. Rec., 167.)

So, also, where a servant sent to deliver goods feloniously dispose of them at an auction store. (*McClure's case*, 3 C. H. Rec., 154.)

A servant intrusted with goods for sale is not guilty of larceny or embezzlement if he appropriate the proceeds to his own use. (*Langley's case*, 4 C. H. Rec., 159.)

If a servant interested with the care of his master's horse, take it from the stable with the intent to run away with it, he is guilty of larceny. (*People v. Wood*, 2 Park., 22.)

Owner's permission, when no defense. (*Sanders' case*, 21 Alb. L. J., 196.)

False pretenses, two things must concur; false statement and reliance thereon. (*People v. Tompkins*, 1 Park., 224; *People v. Miller*, 2 id., 197; *Kelly v. People*, 6 Hun, 509.)

Post dated check. (*Lesser v. People*, 12 Hun, 668.)

If the clerk of the state treasurer receive a draft transmitted to the comptroller in payment of taxes, appropriate it to his own use, he is guilty of larceny. (*People v. Phelps*, 49 How. Pr., 487; 6 Hun, 401; 73 N. Y., 384.)

And it makes no difference that the draft was not received by the prisoner personally. (*Id.*)

Where a person receives goods to be made into coats, afterward sells the same, it is not larceny, unless he received the goods *animo furandi*. (*Abrams v. People*, 6 Hun, 491.)

One who receives money paid him by mistake, and retains it, knowing it is intended for another, is guilty of larceny. (*Wolfstein v. People*, 6 Hun, 121.)

Where two persons conspire together fraudulently to get possession of property, with felonious intent, and succeed, they are guilty of larceny. (*Loomis v. People*, 67 N. Y., 322.)

Where the owner of goods is deceived into the surrender of both possession and title by false representations, the offense is not larceny, but false pretenses. (*People v. Kelly*, 6 Hun, 509.)

If the owner of goods voluntarily part with possession for the purposes of sale, and the party receiving them does so with a fraudulent design, it is not larceny, but false pretenses. (*Zink v. People*, 20 Alb. L. J., 156.)

EMBEZZLEMENT.

An indictment for embezzlement lies against a clerk or servant for converting to his own use money or goods of his master or employer. (*People v. Hennessy*, 15 Wend., 147; *Milligan's case*, 6 C. H. Rec., 69.)

Embezzlement can only be predicated on a particular sum of money. (*People v. Howe*, 2 S. C., 383.)

The servant or clerk must have the custody of the goods. (*People v. Sheahan*, 1 Wh. Crim. Cas., 226.)

A stage driver intrusted with money is a servant within the statute. (*People v. Sherman*, 10 Wend., 298.) Or a bar-keeper. (*People v. Dalton*, 15 Wend., 581.)

A tradesman to whom leather is delivered to be manufactured, is not guilty of embezzlement if he receive the goods in good faith, though he afterward convert it. (*People v. Burr*, 41 How., 298.)

If one partner secretly abstract the partnership funds, and then deny all knowledge of the fact, it amounts to a felony. (*Weeks v. Lowerre*, 19 L. Rep., 448.)

As to the keeper of a county poor-house of funds intrusted to him. (*Coats v. People*, 22 N. Y., 245.)

What facts are necessary to sustain an indictment against the cashier of a bank for embezzlement. (*Bartow v. People*, 18 Hun, 22.)

(n) **False pretenses.**—A cheat or fraud to be indictable at common law must be such as would affect the public. (*People v. Babcock*, 7 Johns., 201; *People v. Miller*, 14 id., 371.)

Fraudulently gaining possession of a promissory note is within the statute. (*People v. Miller*, 14 Johns., 371.)

An unsigned writing not. (*People v. Gates*, 13 Wend., 311.)

A depositor who overdraws his bank account not. (*Allen's case*, 3 C. H. Rec., 118; *Stuyvesant's case*, 4 id., 156.)

The goods must have been actually obtained by means of the pretense. (*Lucie's case*, 1 C. H. Rec., 140; *Davis' case*, 4 id., 61; *Collins' case*, id., 143; *People v. Dalton*, 2 Wh. Cr. C., 161.)

Party must have parted with the custody of the goods. (*Ring's case*, 1 C. H. Rec., 7.)

A bill of lading in which prosecutor has an equitable interest is a subject of an indictment under the statute. (*Lazarus' case*, 1 C. H. Rec., 89.)

The false pretense must be predicated on some matter or thing pretended then to be in existence, but which in truth it was not. (*Conger's case*, 4 C. H. Rec., 65.)

The representations made need not have been the sole inducement to the delivery of the property, but only had so material an effect that without them credit would not have been given. (*People v. Herrick*, 13 Wend., 87.)

To constitute the offense two things must concur, to wit.: A false representation as to an existing fact, and a reliance upon the representation as true. (*People v. Tompkins*, 1 Park., 224; *People v. Miller*, 2 id., 197.)

The representations must be such as are calculated to deceive persons of ordinary prudence and caution. (*People v. Williams*, 4 Hill, 9; *People v. Stetson*, 4 Barb., 151; *People v. Sully*, 5 Park., 142.)

Whether the false pretenses were of such a character is a question for the jury. (*Collins' case*, 4 C. H. Rec., 143; *People v. Dalton*, 2 Whar. Cr. C., 161; *Thomas v. People*, 34 N. Y., 361; *Skeff v. People*, 2 Park., 189.)

What is a false pretense within the statute. (*Stories' case*, 2 C. H. Rec., 2; *Mall's case*, id., 175; *Valentine's case*, 4 id., 33; *Collins' case*, id., 143; *Smith's case*, 5 id., 180; *People v. Dalton*, 2 Whar. Cr. C., 161; *People v. Haynes*, 11 Wend., 557; *People v. Herrick*, 13 id., 187; *Thomas v. People*, 34 N. Y., 351;

People v. Cooke, 6 Park., 81; *People v. Kendall*, 25 Wend., 399; *People v. Johns*, 12 Johns., 292; *Heath's case*, 1 C. H. Rec., 116.)

A false pretense that the prisoner had procured a bill of exchange for the prosecutor, which was ready for delivery, is indictable. (*Decosta's case*, 1 C. H. Rec., 83.)

To obtain payment of an insurer for an article known to the insured not to be destroyed, is false representation. (*People v. Byrd*, 1 Whar. Cr. C., 242.)

A false representation that a check given in payment of goods was good, and that there was money in the bank to meet it, is indictable. (*Smith v. People*, 47 N. Y., 808.)

Falsely representing that a mortgage is a first incumbrance, thereby affecting its sale, is indictable. (*People v. Sully*, 5 Park., 142.)

A false assertion of the cause of a visible defect in personal property is within the statute. (*People v. Orissie*, 4 Den., 535.)

An indictment will not lie for obtaining money as a charitable donation by means of false representations. (*People v. Clough*, 17 Wend., 851.)

Nor by means of which a person obtains payment of a just debt. (*People v. Thomas*, 3 Hill, 169; see *People v. Smith*, 5 Park., 490.)

A representation subsequent to sale and delivery not within the statute. (*People v. Haynes*, 14 Wend., 547.)

To sustain an indictment the property must have been parted with from an honest motive. (*McCord v. People*, 46 N. Y., 470; *People v. Stetson*, 4 Barb., 151.)

An indorsement fraudulently obtained is indictable. (*People v. Stone*, 9 Wend., 182; *People v. Chapman*, 4 Park., 56.)

So, also, of a note thus obtained and afterwards paid. (*People v. Herrick*, 18 Wend., 87.)

Not so if the instrument is void on its face. (*People v. Galloway*, 17 Wend., 540.)

(c) **Indictment.** — Proof in order to sustain an indictment for false pretenses in obtaining signature to note. (*Scott v. People*, 63 Barb., 62.)

Requisites of an indictment for false pretenses. (*Unger's case*, 4 C. H. Rec., 65; 1 Wh. C. C., 448; *Shotwell's case*, 4 C. H. Rec., 75; *Steele's case*, 5 id., 5; *People v. Haynes*, 14 Wend., 557; *People v. Herrick*, 18 id., 87; *People v. Gates*, Id., 311; *Thomas v. People*, 34 N. Y., 351; *People v. Stetson*, 4 Barb., 151; *Clark v. People*, 2 Lans., 229; *Slaff v. People*, 2 Park., 139; *People v. Chop*, 4 id., 56.)

Evidence that the prisoner made similar false pretenses to another not admissible. (*Collins' case*, 4 C. H. Rec., 143.)

Defendant cannot use his own account books as evidence in his favor on a trial for obtaining a signature to a note by false pretenses. (*People v. Genuing*, 11 Wend., 18.)

Not necessary to prove all the pretenses in the indictment. (18 How. Pr., 498; *Bulschafsky v. People*, 3 Hun, 40; 5 S. C., 277.)

The prosecutor may testify that he relied on the representations of the prisoner. (*People v. Sully*, 5 Park., 142.)

Obtaining goods upon a post dated check drawn by one who never had an account in the bank, is within the statute. (*Lesser v. People*, 12 Hun, 668; 73 N. Y., 78; *Foot v. People*, 17 Hun, 218.)

Inducing a public officer, by false and fraudulent representations, to pay

money to a third person not indictable. (*People v. Court Gen. Sess.*, 13 Hun, 395.)

Intent to cheat and defraud is an essential element. (*Brown v. People*, 16 Hun, 535.)

It is sufficient if a false representation be such, that if true would naturally and according to the motives which influence an honest mind, lead directly to the result. (*People v. Sully*, 1 Sheld., 17.)

Statements made two months after the goods were obtained not material. *Shulman v. People*, 14 Hun, 516.)

In order to convict it is not necessary that actual loss or injury should have been sustained by the prosecutor. (*People v. Sully*, 1 Sheld., 17.)

§ 529. Obtaining money or property by fraudulent draft. — A person who willfully, with intent to defraud, by color or aid of a cheque or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly.

New.

(a) **Bill of exchange.**—A false pretense that the prisoner had procured a bill of exchange for the prosecutor which is ready for delivery, is indictable. (*Decosta's case*, 1 C. H. Rec., 88; *Allen's case*, 3 id., 118.)

(b) **Check.**—A check drawn on a bank where prisoner has no funds under a representation that there were funds to meet it, is indictable. (*People v. Smith*, 47 N. Y., 808; *Lesser v. People*, 12 Hun, 670; 73 N. Y., 78; *Foots v. People*, 17 Hun, 218; *Rex v. Jackson*, 3 Camp., 370; *Rex v. Parker*, 7 Car. & P., 825.)

§ 530. Grand larceny in first degree. — A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this chapter,

1. Property of any value, by taking the same from the person of another in the night-time; or,

2. Property of the value of more than twenty-five dollars, by taking the same in the night-time from any dwelling-house, vessel, or railway car; or,

3. Property of the value of more than five hundred dollars, in any manner whatever.

3 R. S., 953, § 80; 3 R. S., 952, § 79; 2 R. S. (Edm.), 699, § 63, 64.

There can be no conviction for grand larceny unless the prisoner stole more

than twenty-five dollars laid in one count. (*Hughes' case*, 4 C. H. Rec., 132; *McKenna's case*, 5 id., 174.)

The prisoner is entitled to have the jury instructed whether the offense proved amount to more than petit larceny. (*Williams v. People*, 24 N. Y., 405; *Rhodihan v. People*, 5 Park., 395; *Higgins v. People*, 7 Lans., 110.)

Under the act of 1862, stealing from the person is grand larceny, without regard to the amount stolen and whether stolen in day or night. (*Fallon v. People*, 2 Keyes, 145; 2 Abb. Dec., 88; 6 Park., 256; see, also, *Wilson v. People*, 39 N. Y., 462.)

§ 531. **In second degree.** — A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this chapter, steals or unlawfully obtains or appropriates,

1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever; or,

2. Property of any value, by taking the same from the person of another; or,

3. A record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law, with, or in keeping of any public office or officer.

3 R. S., 953, §§ 78, 81; 3 R. S., 954, § 86; 2 R. S. (Edm.), 700, § 69; 1 R. L., 112, § 1.

The value of the record or paper carried away is of no importance. (*Ayres v. Corvill*, 18 Barb., 263; see, also, cases cited under previous section.)

§ 532. **Petit larceny.** — Every other larceny is petit larceny.

3 R. S., 969, § 1; 2 R. S. (Edm.), 712, § 1.

It is the duty of the court to instruct the jury that if they find the value of the property stolen of less value than twenty-five dollars, the prisoner can only be convicted of petit larceny. (*Rhodihan v. People*, 5 Park., 395.)

There are no accessories in petit larceny. (*Ward v. People*, 3 Hill, 395; 6 id., 144.)

The taking and carrying off of growing crops of less value than twenty-five dollars is not stealing. (*Comfort v. Fulton*, 13 Abb., 276; 39 Barb., 56.)

§ 533. **Grand larceny in first degree, how punished.** — Grand larceny in the first degree is punishable by imprisonment for not less than five nor more than ten years.

3 R. S., 952, §§ 78, 80, 81; 2 R. S. (Edm.), 699, § 63.

§ 534. **Grand larceny in second degree.** — Grand larceny in the second degree is punishable by imprisonment for not less than two nor more than five years.

Id.

§ 535. **Petit larceny a misdemeanor.** — Petit larceny is a misdemeanor.

3 R. S., 969, § 1; 2 R. S. (Edm.), 712, § 1; Laws 1817, p. 315, § 11; 1 R. L., 410, § 10.

§ 536. **Completed unissued instruments property.** — All the provisions of this chapter apply to cases where the property taken is an instrument for the payment of money, an evidence of debt, a public security, or a passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner.

3 R. S., 954, §§ 90, 91; Laws 1855, ch. 499, §§ 1, 2.

Bank bills complete in form, though unissued, are the subject of larceny. (*People v. Wiley*, 8 Hill, 194.)

So, also, is an unindorsed draft. (*People v. Phelps*, 49 How. Pr., 437; 6 Hun, 401; 72 N. Y., 334.)

§ 537. **Severance of fixture, etc., larceny.** — All the provisions of this chapter apply to cases where the thing taken is a fixture or part of the realty, or any growing tree, plant, or produce, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at a previous time.

3 R. S., 971, § 15; Id., 953, § 85; § 640, subd., 3, *post*; Code Crim. Proc., § 56.

The severing and carrying away growing crops by one act, to an amount of less than twenty-five dollars, is not stealing. (*Comfort v. Fulton*, 13 Abb., 276.)

§ 538. **Keeping wrecked goods, a misdemeanor.** — A person who takes away goods or other property not his own from a stranded vessel, or any goods or other property cast by the sea upon the land, or found in a bay or creek, or who knowingly becomes possessed of any such goods or other property, and does not deliver the same within forty-eight hours thereafter, to the sheriff or one of the coroners or wreck masters of the county where the same was found, is guilty of a misdemeanor.

2 R. S., 982, § 25; 1 R. L., p. 68, § 25.

The felonious appropriation of property which has been swept from the deck of a vessel in a gale, is larceny. (*Dayton's case*, 2 C. H. Rec., 167.)

§ 539. **Lost property.** — A person who finds lost property, under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property

to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

New.

(a) **Concealing property.** — If personal property be left through inadvertence in the possession of another, and he conceal it *animo furandi*, it is larceny. (*People v. McGarren*, 17 Wend., 480.)

(b) **Finding property.** — A *bona fide* finder of a lost article not guilty of larceny by any subsequent appropriation of it. (*People v. Anderson*, 14 Johns., 294.)

A finder of goods who knows the owner, or has reason to believe who is the owner, and fraudulently converts the same to his own use, is guilty of larceny. (*People v. Swan*, 1 Park., 9; 9 Conn., 527; 20 Iowa, 267; 116 Mass., 42; 58 Ala., 525; 25 Iowa, 273; 10 Ill., 305.)

To render the finder of lost property guilty of larceny, he must know the owner, or have the means of identifying him instantaneously at the time of the finding. (*People v. Cogdell*, 1 Hill, 94; 13 Gratt., 725; 14 id., 635.)

If a person find the cattle of another on the highway, and drive them to market with intention of converting them to his own use, he is guilty of larceny. (*People v. Kaatz*, 8 Park., 129.)

(c) **Intent.** — There must be an intent to permanently deprive the owner of property. (*Dodd v. Hamilton*, 2 Taylor, 81; *State v. Hawkins*, 8 Porter, 461; *Smith v. Schultz*, 1 Scam., 490.)

§ 540. **Bringing stolen goods into state, larceny.** — A person, who having, at any place without the state, stolen the property of another, or received such property, knowing it to have been stolen, brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed within the state. Complaint may be made and the indictment found and tried, and the offense may be charged to have been committed, in any county into or through which the stolen property is brought.

8 R. S., 988, § 4; 2 R. S. (Edm.), 721, § 4.

In the case of larceny or burglary a person may be convicted in any county in this state where he carries the stolen property. (*Haskins v. People*, 16 N. Y., 844.)

A foreigner committing a larceny abroad, coming into this state and bringing the stolen property with him, may be indicted, convicted and punished in the same manner as if the larceny had been committed here. (*People v. Burke*, 11 Wend., 129; 1 Mass., 116; 2 id., 14; see *contra*, *People v. Gardner*, 2 Johns., 477.)

§ 541. **Conversion by trustee, larceny; how punished.** — A person acting as executor, administrator, committee, guardian,

receiver, collector or trustee of any description, appointed by a deed, will, or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment or appointment, is guilty of grand or petty larceny in such degree as is herein prescribed, with reference to the amount of such property; and upon conviction, in addition to the punishment in this chapter prescribed for such larceny, may be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding or concealment, and twenty per centum thereupon in addition, and to be imprisoned for not more than five years in addition to the term of his sentence for larceny, according to this chapter, unless the fine is sooner paid.

Laws 1877, ch. 208, § 1.

The treasurer of a savings bank properly convicted as a trustee under this statute for embezzlement. (*Bartow v. People*, 18 Hun, 22.)

§ 542. **Disposition of fine.** — So much of the fine authorized in the last section to be imposed, as does not exceed the amount or value of the property taken, appropriated or stolen, with interest thereupon from the time of the commission of the offense, and a reasonable sum to defray the expenses of collecting the same, to be fixed by the supreme court, must, when received or collected, be paid to the county treasurer of the county where the conviction was had, for the benefit of the person injured or defrauded, or whose property the offender took, misappropriated or concealed, or his representative or assignee; and must be paid over to him by the county treasurer, upon the order of the supreme court, made after notice to the district attorney of the county.

Laws 1877, ch. 208, § 2.

§ 543. **Remission of fine.** — In case of payment of the value of the property stolen or taken, with interest, by the person convicted, or of the collection of the same by civil action, the court may, in its discretion, upon application by such per-

son, and such notice to other persons interested, and to the district attorney of the county, as the court may direct, remit the fine imposed, pursuant to the last section, except the additional allowance for expenses.

Laws 1877, ch. 208, § 3.

§ 544. **Verbal false pretense not larceny.**—A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged.

See 2 R. S. (Edm.), 697, § 53.

§ 545. **Value of evidence of debt, how ascertained.**—If the thing stolen consists of a written instrument, being an evidence of debt, other than a public or corporate certificate, scrip, bond, or security having a market value, or being the transfer of or evidence of title to any property, or of the creating, releasing or discharging of any demand, right or obligation, the amount of money due thereupon or secured to be paid thereby, and remaining unsatisfied, or which, in any contingency, might be collected thereupon or thereby, or the value of the property transferred or affected, or the title to which is shown thereby, or the sum which might be recovered for the want thereof, as the case may be, is deemed the value of the thing stolen.

3 R. S., 953, § 83; 2 R. S. (Edm.), 700, § 66.

Where an indictment charges the larceny of the certificates of stock of an incorporated company their value must be proved. (*People v. Griffin*, 38 How., 475.)

To convict of stealing bank bills their value need not be shown, except that they were received by the prosecutor. (*Hughes' case*, 4 C. H. Rec., 132.)

On the trial of an indictment for the larceny of foreign bank notes, there must be at least a "*prima facie*" evidence of the existence of such banks and of the genuineness of the bills. (*People v. Caryl*, 12 Wend., 547; *Johnson v. People*, 4 Den., 364; *Low v. People*, 2 Park., 37.)

When the prosecutor received the bank note in question in payment for services, that raises a presumption as to the value and genuineness of the note. (*People v. Fallon*, 6 Park., 256; 2 Keyes, 145; 2 Abb. Dec., 88.)

§ 546. **Value of passenger ticket.**—If the thing stolen is a ticket, paper or other writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon a railway car, vessel, or other public conveyance, the price at which a ticket,

entitling a person to a like passage, is usually sold, is deemed the value thereof.

3 R. S., 954, §§ 90, 91; Laws 1855, ch. 499, §§ 1, 2.

§ 547. **Value of other articles.**— In every case not otherwise regulated by statute, the market value of the thing stolen is deemed its value.

New.

§ 548. **Claim of title, ground of defense.**— Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him.

New.

A false representation through which one obtains payment of a just debt is not within the statute. (*People v. Thomas*, 8 Hill, 169.)

But it is no defense that the prosecutor was indebted to the prisoner in a sum equal to the amount obtained, and it was the prisoner's intention to apply the money to the payment of such debt. (*People v. Smith*, 5 Park., 490.)

One cannot be convicted of stealing goods the ownership of which is laid in himself and another. (*Van Cleef's case*, 5 C. H. Rec., 117.)

§ 549. **Intent to restore property.**— The fact that the defendant intended to restore the property stolen or embezzled is no ground of defense, or of mitigation of punishment, if it has not been restored before complaint to a magistrate, charging the commission of the crime.

New.

§ 550. **Knowingly receiving.**— A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation had been committed within the state, whether such property were so stolen or misappropriated within or without the state, is guilty of criminally receiving such

property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

8 R. S., 954, § 88; 2 R. S. (Edm.), 700, § 71; 1 R. L., 410, § 13.

(a) **Felonious intent.**—An indictment for receiving stolen goods must aver a felonious and fraudulent intent. (*People v. Johns*, 1 Park., 564; *Chatterton v. People*, 15 Abb., 147; *Rice v. State*, 3 Heisk., 215.)

(b) **Bank bill.**—Receiving a stolen bank bill, knowing it to have been stolen, is not within the statute. (*Boyd's case*, 3 C. H. Rec., 59.)

(c) **Consideration unnecessary.**—Not necessary to aver that any consideration passed between the thief and the receiver. (*Hopkins v. People*, 13 Wend., 76.)

(d) **Name of thief immaterial.**—Not necessary that the jury should find that the goods were stolen by the person named as the thief in the indictment. (*People v. Caswell*, 21 Wend., 86.)

(e) **Negotiator for return of stolen goods.**—One who negotiates for the restoration of stolen property in consideration of receiving a per centage himself, may be convicted of the offense of receiving stolen property. (*People v. Wiley*, 3 Hill, 194; *Wells v. People*, 3 Park., 473; *State v. Scovel*, 1 Mills, 271.)

Where several are shown to have confederated in the receiving of stolen goods, all may be convicted, though all were not actually present at the receiving. (*People v. Stein*, 1 Park., 202.)

If jointly indicted, two persons may be convicted, though each received in the absence of the other. (*Chatterton v. People*, 15 Abb., 147.)

(f) **Guilty knowledge necessary.**—The mere finding of a stolen article in possession of another not enough; guilty knowledge must be shown. (*Shotwell's case*, 3 C. H. Rec., 95.)

Guilty knowledge may be deduced from all the circumstances of the case. (*People v. Teal*, 1 Wh. Cr. C., 199; 33 Ala., 494; 60 Ill., 119; 120 Mass., 198.)

(g) **Disreputable resort of thieves.**—On an indictment under this section, it is not competent to prove that defendant's house is a resort of felons who come there to dispose of stolen property. (*People v. Pierpont*, 1 Wh. Cr. C., 139.)

It may be shown, however, that there is a general understanding between the thief and the receiver, but not the special act of receiving other goods than those charged in the indictment. (*McNiff's case*, 1 C. H. Rec., 8; *Bell's case*, 6 id., 96; *People v. Green*, 1 Wh. C. C., 152.)

(h) **Possession of other goods.**—The possession of other stolen goods belonging to the same prosecutor is admissible. (*Jarvis' case*, 1 C. H. Rec., 105.)

Not competent to show that the prisoner has at other times received other stolen goods from other parties, knowing that they were stolen. (*Coleman v. People*, 55 N. Y., 81; overruling *People v. Rande*, 3 Park., 335.)

Proof that the prisoner had frequently received similar articles under like circumstances from the same thief, stolen from the same person or place, knowing that they were stolen, is admissible upon the question of guilty knowledge. (*Copperman v. People*, 56 N. Y., 591; 1 Hun, 15.)

It is not competent for the defendant to prove what the person from whom he received the goods said as to the mode in which he became possessed thereof. (*Wills v. People*, 3 Park., 473.)

A married woman may be convicted jointly with her husband for receiving stolen goods, when she participates actively in the crime or in secreting them in the absence of her husband. (*Goldstein v. People*, 22 Alb. L. J., 415.)

§ 551. **Averment and proof.** — It is not necessary to aver, in an indictment for an offense specified in the last section, nor to prove upon the trial thereof, that the principal who stole the property has been convicted, or is amenable to justice.

3 R. S., 954, § 89; 2 R. S. (Edm.), 700, § 71.

As to conviction of principal in arson, and its effect. (See *Levy v. People*, 19 Hun, 383.)

To sustain a conviction for receiving stolen goods, it is not necessary that the jury should find that the goods were stolen by the person named as the thief in the indictment. (*People v. Caswell*, 21 Wend., 86.)

CHAPTER V.

EXTORTION AND OPPRESSION.

SECTION 552. "Extortion" defined.

553. What threats may constitute extortion.

554. Punishment of extortion in certain cases.

555. Compulsion to execute instrument.

556, 557. Oppression and extortion committed under color of official right.

558. Blackmail.

559. Written threat.

560. Attempts to extort money, or property, by verbal threats

561. Unlawful threat referring to act of third person.

§ 552. "**Extortion**" defined. — Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

New in form. (2 R. S. [Edm.], 669, § 5; 2 R. S. [Edm.], 712, § 2; 1 R. L., 111.)

(a) **Want of jurisdiction.** — If a justice give judgment where he has no jurisdiction of the person of the defendant, and exact from him a sum of money as his costs, it is an indictable offense. (*People v. Whaley*, 6 Cow., 661; *Williams v. State*, 2 Sneed, 160; *Com. v. Mitchell*, 3 Bush., 25.)

Extortion is the taking of money by an officer, by color of his office, either where no money is due, or where not so much is due, or when it is not yet due. (Id.; *Com. v. Badgley*, 7 Pick., 246; *Ming v. Truett*, 1 Mont., 322.)

The jury are to judge whether the money was received from corrupt intent or under a mistake of law. (Id.; 3 Bush., 39; 7 Pick., 219.)

The officer must have acted in his official capacity. (55 Ala., 125; 10 Mass., 210.)

The design to collect fees to which he is not entitled constitutes the corrupt intent, which is the essence of the offense. (34 Ala., 254; 3 Brev., 175; 1 Mass., 228; 15 id., 525; 17 id., 410.)

A mere agreement to pay is not sufficient. (16 Mass., 91; 5 id., 523.) Unless the agreement can be made the basis of a suit. (1 Ld. Raym., 148.)

The fact that the officer's costs have been regularly taxed is an answer in a prosecution under the statute against extortion. (*Supervisors of Onondaga v. Briggs*, 2 Den., 26, 41.)

A constable may be indicted for a misdemeanor in taking fees beyond those allowed by law. (*Parker v. Newland*, 1 Hill, 87, 88.)

§ 553. What threats may constitute extortion. — Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or,

2. To accuse him, or any relative of his, or any member of his family, of any crime, or,

3. To expose, or impute to him, or any of them, any deformity or disgrace; or,

4. To expose any secret affecting him or any of them.

2 R. S. (Edm.), 690, § 2; Laws 1878, ch. 288, § 2; § 254, *ante*; *People v. Brennan*, 30 Mich., 460; *State v. Bruce*, 26 Me., 71; *Brabham v. State*, 18 Ohio (N. S.), 485; see, also, *Am. Fire Ins. Co. v. Britton*, 8 Bos., 148; *People v. Whaley*, *supra*.)

§ 554. Punishment of extortion in certain cases. — A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding five years.

2 R. L., 80, § 5.

§ 555. (Amended 1882.) Compulsion to execute instrument. — The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting, or intended to affect, any cause of action or defense, or any property, is an extortion of property within the last two sections.

New.

§ 556. **Extortion committed under color of official right.** — A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority,

1. Arrests another, or detains him against his will ; or,
2. Seizes or levies upon another's property ; or,
3. Dispossesses another of any lands or tenements ; or,
4. Does any other act whereby another person is injured in his person, property or rights ;

Commits oppression, and is guilty of a misdemeanor.

3 R. S., 971, § 11; 2 R. S. (Edm.), 778, § 17; see *Supervisors of Onondaga v. Briggs*, 2 Den., 28; *People v. Calhoun*, 3 Wend., 420.

§ 557. **Extortion committed under color of official right** — A public officer who asks or receives, or agrees to receive, a fee or other compensation for his official service, either,

1. In excess of the fee or compensation allowed to him by statute therefor ; or,
2. Where no fee or compensation is allowed to him by statute therefor ;

Commits extortion, and is guilty of a misdemeanor.

3 R. S., 928, §§ 5, 6; 2 R. S. (Edm.), 778, § 17; 2 id., 714, § 11; 1 R. L., 82, § 10; see, also, §§ 48, 49, 50, *ante*, and cases cited under § 552, *ante*.

§ 558. **Blackmail.** — A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening,

1. To accuse any person of a crime ; or,
 2. To do any injury to any person or to any property ; or,
 3. To publish or connive at publishing any libel ; or,
 4. To expose or impute to any person any deformity or disgrace ;
- Is punishable by imprisonment for not more than five years.

3 R. S., 951, § 72; 2 R. S. (Edm.), 698, § 58; Laws 1878, ch. 288, § 2.

A letter in defendant's own name, sent to enforce payment of a debt, is not within the statute. (*People v. Griffin*, 2 Barb., 427; 1 Leach, 445; 2 East P. C., 1116.)

Dropping a letter in a man's way is a sending. (Russ. & R., 898.)

So, also, to put a letter in a place where it would be likely to be seen. (5 Cox C. C., 226.)

A charge of an intent to extort, and gain money from "A," through a threatening letter, necessarily implies that it was "A.'s" property. (*Briggs v. People*, 8 Barb., 547.)

§ 559. **Written threat.** — A person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received, any letter or other writing, threatening to do any unlawful injury to the person or property of another, is guilty of a misdemeanor.

3 R. S., 951, § 72; 2 R. S. (Edm.), 698, § 58; Laws 1878, ch. 288; Laws 1880, ch. 209; see *People v. Griffin*, *supra*; *Briggs v. People*, 8 Barb., 547.

§ 560. **Attempts to extort money, or property, by verbal threats.** — A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, verbally makes such a threat as would be criminal under either of the foregoing sections of this chapter, if made or communicated in writing, is guilty of a misdemeanor.

3 R. S., 969, § 2; Laws 1878, ch. 288.

§ 561. **Unlawful threat referring to act of third person.** It is immaterial whether a threat, made as specified in this chapter, is of things to be done or omitted by the offender, or by any other person.

New.

CHAPTER VI.

FALSE PERSONATION, AND CHEATS.

SECTION 562. Falsely personating another.

563. Limitations as to indictments.

564. Receiving property in false character.

565. Personating officers, firemen, and other persons.

566. Obtaining property by false pretenses.

567. Obtaining property for charitable purposes.

568. Obtaining negotiable evidences of debt by false pretenses.

569. Using false check or order for payment of money.

570. Obtaining employment, etc.

571. Secreting personal property.

572. Pawning, etc., borrowed property.

573. Last section qualified.

574. Mock auctions.

§ 562. **Falsely personating another.** — A person who falsely personates another, and, in such assumed character,

1. Marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter; or,

2. Becomes bail or surety for a party in an action or special proceeding, civil or criminal, before a court or officer authorized to take such bail or surety; or,

3. Confesses a judgment; or,

4. Subscribes, verifies, publishes, acknowledges, or proves a written instrument, which by law may be recorded, with intent that the same may be delivered or used as true; or,

5. Does any other act, in the course of any action or proceeding, whereby, if it were done by the person falsely personated, such person might in any event become liable to an action or special proceeding, civil or criminal, or to pay a sum of money, or to incur a charge, forfeiture, or penalty, or whereby any benefit might accrue to the offender, or to another person;

Is punishable by imprisonment in a state prison for not more than ten years.

3 R. S., 948, § 53; 2 R. S. (Edm.), 696, § 48; 1 R. L., 111, § 1.

What constitutes the crime of fraudulently producing an infant. (*People v. Cunningham*, 3 Park., 520.)

Assuming a fictitious name is false pretenses if it influences the obtaining of money or goods. (19 Pick., 179.)

So, of assuming the name of another to whom money is due. (19 Pick., 179; 2 Pars. Cas., 383; 6 Cox C. C., 515; 9 Adol. & Ell., 276; 7 Carr. & P., 784.)

§ 563. **Limitations as to indictments.** — An indictment cannot be found, for the crime specified in subdivision first of the last section, except upon the complaint of the person injured, if there be any such person living, and within two years after the perpetration of the crime.

3 R. S., 948, § 54; 2 R. S. (Edm.), 696, § 49.

§ 564. **Receiving property in false character.** — A person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person who is not entitled thereto, is punishable in the same manner and to

the same extent, as for larceny of the money or property so received.

3 R. S., 948, § 55; 2 R. S. (Edm.), 696, § 49.

A man who indorses a bill of lading made to another of the same name, and obtains money thereon, is guilty of forgery. (*People v. Peacock*, 6 Cow., 72.)

Falsely personating a police officer, etc. (*McCord v. People*, 46 N. Y., 470; *People v. Stetson*, 4 Barb., 151.)

§ 565. Personating officers, firemen, and other persons.

A person, who falsely personates a public officer, civil or military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who assumes, without authority, any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character does an act, purporting to be official, whereby another is injured or defrauded, is guilty of a misdemeanor.

3 R. S., 986, § 118; Laws 1874, ch. 340.

Falsely personating a police officer in making an arrest, or threatening so to do.. (*McCord v. People*, 46 N. Y., 470; *People v. Stetson*, 4 Barb., 151.)

§ 566. Obtaining property by false pretenses. — A person, who, with intent to cheat or defraud another, designedly, by color or aid of a false token or writing, or other false pretense, obtains the signature of any person to a written instrument, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than three times the value of the money or property affected or obtained thereby, or by both such fine and imprisonment.

3 R. S., 948, § 58; 2 R. S. (Edm.), 597, § 53; 1 R. L., 410, § 13; see §§ 528, 529, 544, *ante*.

The intent to cheat and defraud is an essential element in the offense of obtaining the signature of a person to a deed by false pretenses. (*Brown v. People*, 16 Hun, 535; *Therasson v. People*, 20 id., 55; 82 N. Y., 238; see, also, *Lesser v. People*, 12 Hun, 670; *Rex v. Jackson*, 3 Camp., 370; *Rex v. Parker*, 3 C. & P., 825; see, also, cases cited under § 528, *ante*.)

§ 567. Obtaining property for charitable purposes. — A person, who willfully, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or any money or property, for any alleged or pretended charitable or benevolent purpose, is punish-

able by imprisonment for not less than one nor more than three years, or by a fine to an amount not exceeding the value of the money or property obtained, or by both.

8 R. S., 948, § 58; Laws 1851, p. 268, ch. 144.

An indictment will not lie for obtaining money as a charitable donation by means of fraudulent representation. (*People v. Clough*, 17 Wend., 351.)

§ 568. Obtaining negotiable evidence of debt by false pretenses. — If the false token, by which money or property is obtained in violation of sections five hundred and sixty-six and five hundred and sixty-seven, is a promissory note or other negotiable evidence of debt purporting to be issued by or under the authority of any banking company or corporation not in existence, the person guilty of such cheat is punishable by imprisonment in a state prison not exceeding seven years, instead of by the punishment prescribed by those sections.

Laws 1851, ch. 144; see *People v. Rynders*, 13 Wend., 425.

§ 569. Using false cheque or order for payment of money. — The use of a matured cheque, or other order for the payment of money, as a means of obtaining a signature, or money or property, such as is specified in sections five hundred and sixty-six and five hundred and sixty-seven, by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token within the meaning of those sections, although no representation is made in respect thereto.

New. (See § 529, *ante*.)

(a) **Overdrawing account.** — A depositor who overdraws his bank account is not guilty of obtaining money by false pretenses. (*Allen's case*, 3 C. H. Rec., 118; *Stuyvesant's case*, 4 id., 156.)

(b) **Post-dated check.** — Obtaining money on a post-dated check drawn by one who never had an account in a bank, and who could not be found, is within the statute. (*Lesser v. People*, 13 Hun, 668; 73 N. Y., 78; *Boyle v. People*, 17 Hun, 218; *contra*, see *Van Pell's case*, 1 C. H. Rec., 138.)

(c) **Forged letter.** — An attempt to obtain money from a bank by means of a forged letter transmitting a certificate of deposit, is within the statute. (*People v. Ward*, 15 Wend., 231; see, also, *Conger's case*, 4 C. H. Rec., 65; *People v. Tompkins*, 1 Park., 224.)

§ 570. Obtaining employment, etc. — A person who obtains employment, or appointment to any office or place of trust, by color or aid of any false or forged letter or certificate of recom-

mendation, or of any false statement in writing, as to his name, residence, previous employment or qualifications, is guilty of a misdemeanor.

3 R. S., 978, § 72; Laws 1874, ch. 53; see *People v. Ranney*, 22 N. Y., 418.)

§ 571. (Amended 1882.) **Secreting personal property.** — A person who, having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee, or a purchaser thereof, is guilty of a misdemeanor.

3 R. S., 978, § 78; Laws 1871, ch. 77.

§ 572. (Amended 1882.) **Pawning, etc., borrowed property.** — A person who, without the consent of the owner thereof, sells, pledges, pawns, or otherwise disposes of any property which he has borrowed or hired from the owner, is guilty of a misdemeanor.

Laws 1880, ch. 179, p. 208; § 355, *ante*.

§ 573. **Last section qualified.** — The last section does not apply to a person leasing or lending property, for a time not exceeding that for which the same was leased or lent to himself.

New.

§ 574. **Mock auctions.** — A person who obtains money or property from another, or obtains the signature of another to any writing, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in a state prison not exceeding three years, or in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment; and in addition thereto he forfeits any license he may hold to act as an auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this state.

2 R. S., 239, §§ 61, 62; Laws 1853, p. 219, ch. 188; see § 448, *ante*.

CHAPTER VII.

FRAUDULENTLY FITTING OUT AND DESTROYING VESSELS.

SECTION 575. Person willfully destroying vessel, etc.

576. Fitting out or lading any vessel, with intent to wreck the same.

577. Making false manifest, etc.

§ 575. **Person willfully destroying vessel, etc.** — A person who wrecks, burns, sinks, scuttles, or otherwise injures or destroys a vessel, or the cargo of a vessel, or willfully permits the same to be wrecked, burned, sunk, scuttled, or otherwise injured or destroyed, with intent to prejudice or defraud an insurer or any other person, is punishable by imprisonment for not more than five years.

2 R. S., 953, §§ 47, 48; 2 R. S. (Edm.), 686, §§ 4, 5; Laws 1870, ch. 299, §§ 2, 3.

§ 576. **Fitting out or lading any vessel, with intent to wreck the same.** — A person who fits out any vessel, or who lades any cargo on board of a vessel, with intent to permit or cause the same to be wrecked, sunk or otherwise injured or destroyed, and thereby to defraud or prejudice an insurer or another person, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three.

2 R. S., 953, § 49; 2 R. S. (Edm.), 717, § 24.

§ 577. **Making false manifest, etc.** — A person, guilty of preparing, making or subscribing, a false or fraudulent manifest, invoice, bill of lading, ship's register or protest, with intent to defraud another, is punishable by imprisonment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

New in form. (See Laws 1827, p. 220, § 1.)

CHAPTER VIII.

FRAUDULENT DESTRUCTION OF PROPERTY INSURED.

SECTION 578. Destroying property insured.

579. Presenting false proofs of loss in support of claim upon policy of insurance.

§ 578. **Destroying property insured.** — A person who, with intent to defraud or prejudice the insurer thereof, willfully burns, or in any manner injures or destroys property not included or described in section five hundred and seventy-five, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances that the offense is not arson in any of its degrees, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

New.

To obtain payment from an insurer, by a false affirmation of the loss of an article that is not destroyed, is a false pretense within the statute. (*People v. Byrd*, 1 Wh. Cr. Cas., 242.)

To convict of arson in third degree, it must be averred that the house was insured against loss by fire, and that the offense was committed with intent to defraud the insurers. (*People v. Henderson*, 1 Park., 560; see, also, *Freund v. People*, 5 id., 198.)

§ 579. (Amended 1882.) **Presenting false proofs of loss in support of claim upon policy of insurance.** — A person who knowing it to be such, either presents or causes to be presented a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,

Prepares, makes or subscribes a false or fraudulent account, certificate, affidavit of proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim,

Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

New.

CHAPTER IX.

FALSE WEIGHTS AND MEASURES.

SECTION 580. Using false weights, measures, etc.

581. Keeping false weights.

582. False weights and measures authorized to be seized.

583. May be tested by committing magistrate, and destroyed or delivered to district attorney.

584. Shall be destroyed after conviction of offender.

585. Stamping false weight or tare on casks or packages.

§ 580. **Using false weights, measures, etc.** — A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor.

2 R. S., 803, § 32; Laws 1851, ch. 184, § 32.

The use of false weights and measures having been made a felony by statute, an indictment therefor must lay the act to have been done feloniously. (*People v. Fish*, 4 Park., 206.)

And the persons intended to be defrauded must be named, or it must be averred that they are to the jury unknown. (*Id.*)

Where the action is to recover damages for the use of false weights, it is not necessary to allege a "*scienter*" on the part of defendant. (*Bayard v. Smith*, 17 Wend., 88, 89.)

Requisite of an indictment for cheating by false weights and measures. (*People v. Fish*, 1 Sheld., 537.)

§ 581. **Keeping false weights.** — A person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

New.

§ 582. **False weights and measures authorized to be seized.** — A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

New.

§ 583. **May be tested by committing magistrate, and destroyed or delivered to district attorney.** — The magistrate to whom any weight or measure is delivered pursuant to the last section, must upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice in his judgment require.

New.

§ 584. **Shall be destroyed after conviction of offender.** — Upon the conviction of the defendant, the district attorney must cause any weight or measure, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed.

New.

§ 585. **Stamping false weight or tare on casks or packages.** — A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

New in form. (See Laws 1851, ch. 134, § 26.)

CHAPTER X.

FRAUDULENT INSOLVENCIES BY INDIVIDUALS.

SECTION 586. Fraudulent conveyances.

587. Fraudulent removal of property to prevent levy.

588. Knowingly receiving property.

589. Concealment of effects of insolvent debtor.

§ 586. **Fraudulent conveyances.** — A person who either,

1. Becomes a party to a conveyance or assignment of real or personal property, or of an interest therein, with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons; or,

2. Being a party or privy to, or knowing of, such a conveyance

or assignment so made, willfully puts the same in use as having been made in good faith;

Is guilty of a misdemeanor.

3 R. S., 969, § 3; 2 R. S. (Edm.), 142, § 1.

(a) **Voluntary conveyances.**—A conveyance not voluntary, where any valuable consideration moves from the grantee. (*Peek v. Peek*, 4 Wend., 800; *Fellows v. Emperor*, 18 Barb., 92.)

A voluntary conveyance is void as against a subsequent purchaser for value. (*Sterry v. Arden*, 1 Johns. Ch., 261.)

Marriage is a good consideration. (*Id.*)

In the absence of fraud, the fact that the intended husband was largely indebted at the time of making the ante-nuptial contract does not invalidate it. (*Starkey v. Kelly*, 50 N. Y., 676.)

A voluntary conveyance may become valid by matter *ex post facto*. (*Wood v. Genet*, 8 Wend., 9.)

A voluntary conveyance fairly made is binding in equity, though the deed be never delivered. (*Sowerby v. Arden*, 1 Johns. Ch., 240; *Bunn v. Winthrop*, *Id.*, 829.)

A voluntary conveyance made in consideration of the guaranty of a judgment, believed at the time to be well secured, on the original debtor's land, not fraudulent *per se*. (*Seward v. Van Wyck*, 8 Cow., 406; *Bank of U. S. v. Houseman*, 6 Paige, 526.)

A voluntary conveyance is void as against a trustee for the benefit of creditors under a general assignment. (*Bayard v. Hoffman*, 4 Johns. Ch. 450; *Brownell v. Curtis*, 10 Paige, 210; *Storin v. Davenport*, 1 Sandf. Ch. 185.)

A family settlement will not be set aside where a creditor, though being secured, failed through his own laches to get his pay. (*Pell v. Tredwell*, 5 Wend., 661.)

A voluntary settlement upon a wife, which is reasonable and proper under the circumstances, will not be set aside. (*Babcock v. Eckler*, 24 N. Y., 623; *Childs v. Connor*, 6 J. & Sp., 471; *Wilbur v. Fradenburgh*, 50 Barb., 474.)

A debtor who purchases land and procures the deed to be made to his wife is fraudulent as to existing creditors. (*Watson v. Le Row*, 6 Barb., 481; *Mead v. Gregg*, 12 Barb., 658.)

A voluntary conveyance is not void by reason of a trifling indebtedness which he retains ample means to pay. (*Peek v. Peek*, 4 Wend., 800; *Van Wyck v. Seward*, 6 Paige, 62; 18 Wend., 875; *Dunlap v. Hawkins*, 2 S. C., 292.)

An existing indebtedness at the time of a conveyance is not evidence of fraud, unless shown to have exceeded the grantor's ability to pay. (*Loeschigk v. Hatfield*, 5 Rob., 26; 4 Abb. Pr. [N. S.], 210; 51 N. Y., 660; *Tuppan v. Butler*, 7 Bosw., 480; *Cushman v. Addison*, 52 N. Y., 638.)

It is enough if a grantor's solvency is dependent upon the fluctuations of the market. (*Carpenter v. Row*, 10 N. Y., 227.)

Whether a voluntary conveyance be fraudulent or not is a question for the jury. (*Bigelow v. Timmerman*, 7 Wend., 436; *Bennett v. McGuire*, 58 Barb., 625; 5 Lans., 188.)

May be fraudulent, though grantee be not privy to the fraud. (*Mohawk Bank v. Atwater*, 2 Paige, 54.)

A voluntary assignment is *prima facie* valid as to subsequent creditors. (*Botts v. Cosine*, Hoff. Ch., 79.)

A voluntary conveyance may be upheld as to subsequent creditors. (*Lor-mere v. Campbell*, 60 Barb., 62; *Tappan v. Butler*, 7 Bosw., 480.)

Not so if largely indebted. (*Mills v. Morris*, Hoff. Ch., 419; *Holmes v. Clark*, 48 Barb., 237.)

The carrying out of a prior agreement of partition will not be held void. (*Bilsborow v. Titus*, 15 How., 95.)

The gift of a soldier's bounty to his wife is not a fraud on creditors, it being exempt. (*Youman's v. Boomhower*, 3 S. C., 21.)

A reconveyance of land, for which nothing had ever been paid, not within the statute. (*Van Allen v. Ham*, 15 Johns., 261.)

A transfer of all his property by a debtor, without consideration, in trust for his own use during life, is a fraud upon existing creditors. (*Young v. Heermans*, 66 N. Y., 374.)

A voluntary conveyance, which the grantor was under no legal obligation to make, is void as to existing creditors. (*Champlin v. Seeber*, 56 How. Pr., 46.)

A voluntary conveyance to a wife, without consideration, is fraudulent as to creditors, though she was ignorant of any fraudulent intent. (*Smart v. Harring*, 52 How., 505; see *Carr v. Breese*, 18 Hun, 184.)

Such a conveyance is valid against all persons except existing creditors. (*Zimmerman v. Schoenfeldt*, 8 Hun, 692; *Ocean Bank v. Hodges*, 9 id., 161.)

The absence of consideration between husband and wife is only a circumstance indicating fraud. (*Holden v. Burnham*, 63 N. Y., 74; 5 S. C., 175.)

Moral obligation a good consideration between husband and wife. (*Lowry v. Smith*, 9 Hun, 514.)

The discontinuance of a divorce suit not a good consideration as against creditors. (*Morgan v. Potter*, 17 Hun, 403.)

A solvent husband may take a conveyance in the name of his wife. (*Spicer v. Ayers*, 53 How., 405; *Seaman v. Wall*, 54 id., 47.)

A gift *inter vivos* cannot be questioned except by creditors. (*Duigan v. McCormack*, 53 How., 411.)

A debtor may not work for his wife gratuitously when he has no property with which to pay his creditors. (*Sheldon v. Bulton*, 5 Hun, 110.)

(b) **Fraudulent intent.**—Fraudulent intent may be inferred from the circumstances of the case. (*Hildreth v. Sands*, 2 Johns Ch., 35; 14 Johns., 493; *Stetson v. Brown*, 7 Cow., 732; *Vance v. Phillips*, 6 Hill, 433; *Bank of Orange Co. v. Fink*, 7 Paige, 87; *Crane v. Mitchell*, 1 Sandf. Ch., 251; *Currie v. Hard*, 2 id., 353; *Cook v. Smith*, 3 id., 33; *Delaware v. Ensign*, 31 Barb., 85; *Pine v. Rikert*, Id., 469; *Newman v. Cordell*, 43 id., 448; *Waverly Bank v. Halsey*, 57 id., 249; *Briggs v. Mitchell*, 60 id., 288; *Wilson v. Ferguson*, 10 How., 175; *Saloman v. Moral*, 53 How. Pr., 342.)

(c) **Absolute conveyance as security—Intent.**—An absolute conveyance intended as a mere security not fraudulent *per se*. (*Rigney v. Tallmadge*, 17 How., 556.)

Fraud will not be presumed where an instrument admits of an innocent construction. (*Bank of Silver Creek v. Talcott*, 23 Barb., 550.)

Where the intent is to defeat a recovery in an action for tort, it is fraudulent. (*Van Buren v. Myers*, 18 Johns., 425; *Pendleton v. Hughes*, 65 Barb., 136.)

A sale by one indebted in consideration of supporting his family is fraudulent and void as to creditors. (*Cary v. Parker*, 9 Cow., 73.)

(d) **Future support.**— A conveyance of personal property in consideration of the future support of the assignor, his wife and children, is void as to subsequent creditors. (*McLean v. Button*, 19 Barb., 450.)

A person about to engage in a new business may not convey his property to his wife without consideration. (*Case v. Phelps*, 39 N. Y., 164.)

(e) **Unreasonable amount assigned.**— A debtor may not assign an unreasonable amount of property to satisfy a single creditor. (*Beak v. Burdett*, 1 Paige, 305.)

(f) **Controlling intent.**— An assignment not necessarily void as tending to hinder and delay, unless that be the controlling intent. (*Eyre v. Beebe*, 28 How., 333; *Jaques v. Greenwood*, 12 Abb., 232.)

(g) **Assignment in trust.**— An assignment in trust to creditors to an assignee known to be insolvent is *prima facie* fraudulent. (*Reed v. Emery*, 8 Paige, 417.)

(h) **Delaying creditors.**— An assignment by an insolvent debtor for the purpose of delaying his creditors is fraudulent as to them. (*Planck v. Schermerhorn*, 3 Barb. Ch., 644; *Van Nest v. Yoe*, 1 Sandf. Ch., 4; *Ogden v. Peters*, 21 N. Y., 23; 15 Barb., 560.)

But it is not so *per se*. (*Ogden v. Peters*, 21 N. Y., 23; 15 Barb., 560; *Rokenbaugh v. Hubbell*, 15 L. Rep., 95.)

(i) **Circumstantial evidence of fraud.**— What circumstances point to fraud. (*Mead v. Phillips*, 1 Sandf. Ch., 88; *Craun v. Mitchell*, 2 id., 251; *Currie v. Hart*, 2 id., 353.)

A fictitious preference in favor of assignee's wife evidence of fraud. (*Am. Ez. Bank v. Webb*, 86 Barb., 291; 15 How., 193; *Terry v. Butler*, 43 Barb., 395.)

An assignment with intent to cause delay, in order to affect a compromise, is fraudulent. (*Keteltas v. Wilson*, 86 Barb., 298; 23 How., 69; *Work v. Ellis*, 50 Barb., 512; *Hooper v. Tuckerman*, 3 Sandf., 311.)

An insolvent debtor may lawfully prefer one creditor to another by a conveyance of property to secure him. (*McMenomy v. Roosevelt*, 3 Johns. Ch., 446; *Bedell v. Chase*, 34 N. Y., 386; *Carpenter v. Muren*, 42 Barb., 300; *Powers v. Graydon*, 10 Bosw., 630; *Bishop v. Halsey*, 13 How. Pr., 154; 3 Abb. Pr., 400.) Even if such creditor has purchased claims at a large discount. (*Powers v. Graydon*, 10 Bosw., 630.) Or if it be to secure future allowances. (*Hendricks v. Robinson*, 2 Johns. Ch., 283; 17 Johns., 438.)

Effect of threat before making an assignment. (*Wilson v. Britton*, 26 Barb., 562; 6 Abb., 97; *Dickinson v. Benham*, 10 id., 390; 19 How., 410; 12 Abb., 158; 20 How., 343; *Gashier v. Apple*, 14 Abb. Pr., 64.)

Where a conveyance is made with intent to defraud creditors, it is immaterial that the grantor retained an ample estate to pay his debts. (*Fox v. Moyer*, 54 N. Y., 125.)

An assignment by an insolvent, which provides for the payment to the wife of a debt not recoverable at law, is fraudulent. (*Planck v. Schermerhorn*, 3 Barb. Ch., 644.)

Not of an equitable debt, however. (*Spencer v. Ayrault*, 10 N. Y., 302.)

The mere sale of goods to one, knowing him to be in failing circumstances, not evidence of intent (*Loeschigk v. Bridge*, 42 N. Y., 421; 42 Barb., 171; *Downing v. Kelly*, 49 Barb., 547; *McClune v. Cain*, 2 Keyes, 203; 3 Abb. Dec., 76.)

If sold on long credit, however, not so. (*Browning v. Hart*, 6 Barb., 91; *Lichfield v. Pelton*, Id., 187.)

Or if the transfer be made with intent to prevent another creditor from getting his pay. (*Walsh v. Kelly*, 42 Barb., 98; 37 How. Pr., 359.)

But if sold at a fair valuation for cash, not fraudulent, even if the vendor intended to hinder and delay others. (*Ruhl v. Philips*, 48 N. Y., 125.)

An insolvent retiring partner of an insolvent firm may transfer his interest to the continuing partner, who assumes all firm liabilities, even as against individual creditors. (*Griffin v. Cranston*, 1 Bosw., 281; 10 id., 1; *Hummell v. Willett*, 6 id., 538; *Matteson v. Demarest*, 4 Rob., 161.)

(j) **Valuable consideration.**—A valuable consideration will not sustain a conveyance tainted with actual fraud. (*Goodhue v. Berrien*, 2 Sandf. Ch., 630.)

A chattel mortgage void in part as being given to hinder, etc., is void *in toto*. (*Russell v. Winne*, 37 N. Y., 591.)

(k) **Sale to a wife.**—A conveyance by husband to a wife of a larger amount of property than reasonable to secure her debt, is fraudulent. (*Briggs v. Mitchell*, 60 Barb., 288.)

If a husband build a house on his wife's land, in order to defraud, it can be followed by creditors. (*Isham v. Shafer*, 60 Barb., 317.)

(l) **Evidence of fraudulent intent.**—What is evidence of a fraudulent intent, where a husband purchases land and procures a conveyance to be made to his wife. (*Tappan v. Butler*, 7 Bosw., 480.)

If a husband make a gift of money to his wife with intent to defraud creditors, it is void, not only as to existing creditors. (*Partridge v. Stokes*, 44 How., 381.)

Where a wife purchases property and the deed is made to the husband, a subsequent conveyance to the wife is not fraudulent. (*Holden v. Burnham*, 2 Hun, 678; 5 S. C., 195.)

Where property is conveyed in payment of a *bona fide* debt, to render a deed void as to creditors, there must be a fraudulent intent on the part of the purchaser, as well as vendor. (*Waterbury v. Sturtevant*, 18 Wend., 353; *Carpen-ter v. Muren*, 42 Barb., 300.)

(m) **Ignorance of intent to defraud.**—That the grantee was ignorant of the grantor's fraudulent intent, will not protect him if his own acts are fraudulent. (*Hooker v. Mather*, 7 Cow., 801.)

A conveyance by husband and wife of their joint estate in trust to pay the debts of the husband, and to hold the balance for use of the wife and her heirs, is valid as against a subsequent mortgage of her husband, without notice. (*Rogers v. Benson*, 5 Johns. Ch., 431; *Demon v. Delmonico*, 35 Barb., 554; *Cole v. White*, 26 Wend., 511.)

As to chattel mortgage. (*Marston v. Vulture*, 8 Bosw., 129; 12 Abb., 143; *Smith v. Post*, 1 Hun, 516; 3 S. C., 647; *Pendleton v. Hughes*, 65 Barb., 136; 58 N. Y., 626.)

Purchase-money of land made by one and conveyance made to another; when fraudulent. (*Wail v. Day*, 4 Den., 439; *Curtis v. Fox*, 47 N. Y., 299; *Tappan v. Butler*, 7 Bosw., 480; *Starr v. Strong*, 2 Sandf. Ch., 139.)

(n) **Corporations.**—Transfers made by corporations, when fraudulent. (*Hoyt v. Shelden*, 3 Bosw., 267; *Booth v. Bunce*, 33 N. Y., 139; 31 id., 624; *Peress & Brooks' Paper Works v. Willett*, 1 Rob., 131; 19 Abb., 416.)

A transfer of personal property by an embarrassed client to an attorney, by the latter's advice, for the purpose of putting it beyond the reach of creditors, is fraudulent. (*Goodenough v. Spencer*, 2 S. C., 508; 46 How., 347; 15 Abb. [N. S.], 248.)

An agreement by a debtor, to deprive creditors of his future earnings, agrees to serve another during life for his support, etc., is fraudulent. (*Tripp v. Childs*, 14 Barb., 85.)

The intent determines the character of the assignment. (*Wilson v. Forsyth*, 24 Barb., 105.)

To avoid a deed, fraudulent intent on the part of both grantor and grantee must be shown. (*Newman v. Cordell*, 43 Barb., 448; *N. Y. and Harlem R. R. Co. v. Kyle*, 5 Bosw., 587.)

Conveyances to hinder and delay, etc. (*Rathbun v. Platner*, 18 Barb., 272; 46 id., 157; *Griffin v. Marquardt*, 17 N. Y., 28; *Baker v. Gilman*, 52 Barb., 26; *Paddon v. Williams*, 1 Rob., 840; 2 Abb. [N. S.], 88; *Hansford v. Archer*, 4 Hill, 271; *Starin v. Kelly*, 4 J. & Sp., 366; *Youmans v. Boomhower*, 8 S. C., 21; *Fuller v. Williamson*, 14 How., 289.)

A conveyance with intent to defraud, known to both parties, is not protected by the existence of a valuable consideration. (*Union Bank v. Warner*, 13 Hun, 306; *Ford v. Johnson*, 7 Hun, 563.)

An assignment for the benefit of creditors not fraudulent as against a judgment creditor who has obtained judgment but has not issued execution. (*Hawsett v. Vilmar*, 1 Abb. N. C., 222.)

A deed executed with intent to defraud subsequent creditors, if the grantor should be unfortunate in business in which he is about to engage, is fraudulent as to them. (*Hawley v. Sackett*, 3 Hun, 605; 6 S. C., 322.)

What is sufficient evidence of fraudulent intent to avoid a voluntary conveyance as to creditors. (*Cole v. Tyler*, 65 N. Y., 78; *Avery v. Reynolds*, 5 Alb. L. J., 287.)

(o) **Notice of fraudulent intent.**—Notice of grantor's fraudulent intent may be inferred from the circumstances of the case. (*Saloman v. Morel*, 53 How., 342.)

If the vendee purchase solely with the intent of receiving payment of a just debt, his knowledge of a fraudulent intent on the part of the vendor will not avoid the sale as to creditors. (*Dudley v. Danforth*, 61 N. Y., 626.)

Or even if there be an undisclosed intent on the part of the debtor to hinder and delay other creditors. (*Archer v. O'Brien*, 7 Hun, 146.)

Or though the claim of a creditor was barred by the statute of limitations. (*Hale v. Stewart*, 7 Hun, 591.)

A conveyance by one indebted in pursuance of a parol trust not fraudulent. (*Norton v. Mallory*, 68 N. Y., 434; 1 Hun, 499; *Ocean Bank v. Hodges*, 9 id., 161.)

(p) **Ante-nuptial contract.**—An ante-nuptial contract, that if the intended husband should occupy a portion of the *feme's* real estate after marriage, he would pay interest on a mortgage in lieu of rent, is not fraudulent as to his creditors. (*Odell v. Mylins*, 53 How., 250.)

(q) **Operation of fraudulent conveyances.**—A fraudulent conveyance is void as against creditors intended to be defrauded. (*Stevens v. Sinclair*, 1 Hill, 143; *Sands v. Codrusee*, 4 Johns., 586; *Sands v. Hildreth*, 14 id., 498; *Merritt v. Terry*, 13 id., 471.)

And such a deed may be set aside, though the purchaser was ignorant of the fraud. (*Hildreth v. Sands*, 2 Johns. Ch., 35; 14 id., 493; *Pendleton v. Hughes*, 65 Barb., 136.)

A creditor must show fraudulent intent. (*Jaeger v. Kelly*, 52 N. Y., 274.)

Lands conveyed in fraud of creditors become, after death of grantor, assets in the hands of heirs or devisees. (*Manhattan Co. v. Osgood*, 15 Johns., 162; 3 Cow., 612.)

In an action by a trustee against a sheriff, defendant may show that the assignment was fraudulent. (*Jacobs v. Remsen*, 35 Barb., 384; 12 Abb., 390; *Browning v. Hart*, 6 Barb., 91; *Leach v. Kelsey*, 7 id., 466; *Ogden v. Prentice*, 33 id., 160.)

A creditor cannot attach a fraudulent conveyance collaterally (*Garbut v. Smith*, 40 Barb., 22.)

(*r*) **Who bound.**—A fraudulent conveyance is binding on the grantor and his heirs. (*Malin v. Garnsey*, 16 Johns., 189; *Sanders v. Cadwell*, 1 Cow., 622; *Cadwell v. King*, 4 id., 207; *Storm v. Davenport*, 1 Sandf. Ch., 185; *Dwelly v. Van Houghton*, 4 N. Y. Leg. Obs., 101; *Waterbury v. Westervelt*, 9 N. Y., 598; *Wood v. Hunt*, 38 Barb., 802; *Moseley v. Moseley*, 15 N. Y., 354.)

Neither can a voluntary assignee impeach a prior conveyance. (*Bishop v. Halsey*, 13 How., 154; 3 Abb., 400.)

A subsequent purchaser may. (*McMahon v. Allen*, 35 N. Y., 403; 32 How., 313.)

Where a solvent husband procures a conveyance to his wife, it cannot be impeached by subsequent creditors, nor by the grantor, by reason of his becoming a creditor of the husband for a part of the purchase-money. (*Philips v. Wooster*, 36 N. Y., 412.)

When a firm assigns for the benefit of firm creditors, it cannot be impeached on the ground that it tends to hinder and delay individual creditors. (*Morrison v. Atwell*, 9 Bosw., 508; *Scott v. Guthrie*, 10 id., 408; *King v. Wilcox*, 11 Paige, 569.)

(*s*) **Who are creditors.**—Who are creditors so as to impeach a fraudulent prior conveyance. (*Wilcox v. Fitch*, 20 Johns., 472; *Stewart v. Town*, 4 Cow., 599; *Hastings v. Belknap*, 1 Den., 190; *Lawton v. Levy*, 2 Edw. Ch., 197; *Reubens v. Joel*, 13 N. Y., 488; *Cropsey v. McKinney*, 30 Barb., 47; *Bishop v. Halsey*, 13 How., 154; 3 Abb., 400; *Robinson v. Stewart*, 10 N. Y., 189; *Andrew v. Durant*, 18 N. Y., 496; *Graser v. Stelwagen*, 25 id., 315; *Peckham v. Learys*, 6 Duer, 494; *Baskins v. Shannon*, 3 N. Y., 310; *Wadsworth v. Havens*, 3 Wend., 411.)

The creditors of a fraudulent grantee who have acquired no lien cannot question a reconveyance to the grantor. (*Davis v. Graves*, 29 Barb., 480.)

Purchases by a *bona fide* grantee, how far protected. (*Anderson v. Roberts*, 18 Johns., 515; *Hawley v. Cramer*, 4 Cow., 717; *Ledyard v. Butler*, 9 Paige, 132; *Reynolds v. Park*, 5 Lans., 149; *Mowrey v. Walsh*, 8 Cow., 238; *Frazier v. Western*, 1 Barb. Ch., 220; How. App. Cas., 448; *Campbell v. Erie R. R. Co.*, 46 Barb., 510; *Smart v. Bernent*, 4 Abb. Dec., 453.)

(*t*) **What property may be taken.**—Where property has been assigned in fraud of creditors, the fruits of it as well as the property may be taken by a creditor. (*Briggs v. Merrill*, 58 Barb., 389.)

One who claims under a fraudulent grantee must prove the actual payment of the purchase-money. (*Bolton v. Jacks*, 6 Rob., 166.)

And the fraudulent grantee is liable to respond to the original grantor's creditor for the purchase-money received. (*Fullerton v. Trall*, 42 How., 294.)

Where an assignment is decreed to be fraudulent at a creditor's suit, such decree does not inure to the benefit of other creditors. (*Davis v. Perrins*, 4 Edw. Ch., 62; *Orr v. Gilmore*, 7 Lans., 345.)

A fraudulent grantee not bound to account for the rents and profits prior to the appointment of a receiver. (*Robinson v. Stewart*, 10 N. Y., 189; *Oramer v. Blood*, 57 Barb., 175, 671; 48 N. Y., 684.)

The plaintiff in an action for assault and battery may institute proceedings to set aside a fraudulent conveyance *pendente lite*. (*Martin v. Walker*, 12 Hun, 46.)

And the defendant's sureties on appeal who have paid the claim may be subrogated to the rights of the judgment creditor, though they were cognizant of the fraud. (*Id.*)

The holder of a second chattel mortgage may maintain an action to set aside a prior one on the ground of fraud. (*Anderson v. Hunn*, 5 Hun, 79.)

However, one who takes an assignment of personal property in payment of an antecedent debt cannot question the *bona fides* of a prior chattel mortgage. (*Nelson v. Drake*, 14 Hun, 465.)

A deed fraudulent as to creditors may be set aside, though the grantee was not privy to the fraud. (*Saloman v. Morel*, 58 How., 842.)

One who has conveyed property in fraud of creditors cannot maintain a suit to set aside the conveyance on the ground that great confidence was reposed in the grantee, and that it was done by his advice. (*Renfrew v. McDonald*, 11 Hun, 254.)

Though the grantee is not affected by his grantor's fraudulent intent, if the consideration be inadequate, a court of equity will treat it merely as security for the consideration paid. (*Van Wyck v. Baker*, 16 Hun, 168.)

A conveyance which has been decreed void as to one judgment creditor not necessarily so as to others. (*Warden v. Browning*, 12 Hun, 497.) On decreeing a conveyance to be fraudulent as to creditors, the court cannot direct a sale. It can only permit a sale under execution, or compel a conveyance to a receiver. (*Van Wyck v. Baker*, 10 Hun, 39.)

But the error can only be rectified by motion, not by appeal. (*Cole v. Tyler*, 65 N. Y., 73.)

(u) A fraudulent conveyance is valid as between the parties. (*Deutsch v. Reilly*, 57 How., 75.)

An overseer of the poor has no standing in court to impeach the voluntary deed of the father of a lunatic child, the father having incurred no obligation to the town. (*Bowlesby v. Tompkins*, 18 Hun, 219.)

§ 587. Fraudulent removal of property to prevent levy.—A person who, with intent to defraud a creditor, or to prevent any of his property from being made liable for the payment of his debts, or levied upon by an execution or warrant of attachment, removes any of his property, or secretes, assigns,

conveys, or otherwise disposes of the same, is guilty of a misdemeanor.

§ R. S., 52, § 39; see Code Crim. Proc., § 56.

(a) **Indictment.**—What indictment is sufficient under this section. (*Loomis v. People*, 19 Hun, 601; *Goodenough v. Spencer*, 2 S. C., 508; 46 How., 247.)

(b) **Intent.**—The intent of the assignor determines the character of the transaction. (*Wilson v. Forsyth*, 24 Barb., 105.)

A party may be prosecuted for a misdemeanor by indictment for disposing of his property with intent to defraud. (*People v. Underwood*, 16 Wend., 545.)

The offense is complete although the creditors intended to be defrauded are not judgment creditors. (*Id.*)

(c) **Bona fide removal.**—The *bona fide* removal of property no offense, however. (*Thomas v. People*, 19 Wend., 480; also, see, *People v. Morrison*, 13 Wend., 399.)

§ 588. **Knowingly receiving property.**—A person who receives any property from another knowing that the same is transferred or delivered to him in violation of, or with intent to violate, the last section, is guilty of a misdemeanor.

§ R. S., 52, § 39.

(a) **Intent.**—There must be a fraudulent intent on part of both grantor and grantee. (*Waterbury v. Sturtevant*, 18 Wend., 853; *Carpenter v. Muren*, 42 Barb., 300; *Newman v. Cordell*, 43 id., 448.)

That the grantee was ignorant of the grantor's fraudulent intent will not protect him if his own acts were fraudulent. (*Hooker v. Mather*, 7 Cow., 301.)

An assignment made with intent to hinder, delay, etc., creditors, may be void though assignee was innocent. (*Rathbun v. Platner*, 18 Barb., 273; *Griffin v. Marquardt*, 17 N. Y., 28.)

(b) **Ignorance.**—So also a deed, though the grantee was ignorant of any fraud. (*Hildreth v. Sands*, 2 Johns. Ch., 35; 14 Johns., 493; and see *Pendleton v. Hughes*, 65 Barb., 136; *Saloman v. Morel*, 53 How., 342.)

However, if the vendee purchase solely for the purpose of receiving payment of an honest debt, his knowledge of a fraudulent intent on the part of vendor will not avoid the sale as to creditors. (*Dudley v. Danforth*, 61 N. Y., 626.)

§ 589. **Concealment of effects of insolvent debtor.**—A person who, being an applicant, as an insolvent debtor, for a discharge from his debts, or for exoneration or discharge from imprisonment, or having made a general assignment of his property for the payment of his debts, willfully either,

1. Conceals any part of his estate or effects, or any book, account, or other writing relative thereto; or,

2. Omits to disclose to the court before which his application

is pending, any debt or demand which he has collected, or any transfer of property which he has made, since the presentation of his application; or,

3. Fraudulently presents, or authorizes to be presented in his behalf, such an application, in a case where it is not authorized by law; or,

4. Makes or presents to the court or officer in support of such an application, a petition, schedule, book, account, voucher, or other paper or document, knowing the same to contain a false statement; or,

5. Fraudulently makes and exhibits, or alters, obliterates, or destroys an account or voucher, relating to the condition of his affairs, or an entry or statement in such an account or voucher; or,

6. Commits any fraud upon a creditor, to induce him to petition for, or consent to such a discharge; or,

7. Conspires with, or induces another fraudulently to consent as creditor to a petition for such discharge, or to practice any fraud in aid thereof;

Is guilty of a misdemeanor.

3 R. S., 970, § 4; Laws 1819, p. 117, § 5; Laws 1831, p. 402, § 26.

A fraudulent debtor arrested under the act to abolish imprisonment for debt cannot make an assignment or confer a judgment that will be valid as against the prosecuting creditor. (*Wood v. Bolard*, 8 Paige, 556; *Matter of Hurst*, 7 Wend., 289.)

The provision of the law of 1831, making it a misdemeanor to remove one's property from the county to prevent a levy, etc., extends to all creditors and not to those alone who have obtained judgments. (*People v. Underwood*, 16 Wend., 546.)

A person having a watch on his person, and refusing to deliver it to the officer, is not a concealing within this section. (*People v. Morrison*, 13 Wend., 399.)

A debtor arrested for concealing, etc., is entitled to a regular examination as in any other case. (*Ion v. People*, 12 Wend., 344; *Vanderwerken v. People*, 5 id., 530.)

What circumstances amount to a concealing of property under the section. (*McButt v. Hirsch*, 4 Abb., 441.)

Threat to assign or secrete. (*Gasherie v. Apple*, 14 Abb., 64; *Dickinson v. Benham*, 10 id., 390; 19 id., 158.)

CHAPTER XI.

**FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS
IN THEIR MANAGEMENT.****SECTION 590. Frauds in subscriptions for stock of corporations.**

- 591. Fraudulent issue of stock, scrip, etc.
- 592. Frauds in procuring organization of corporation, or increase of capital.
- 593. Unauthorized use of names in prospectuses, etc.
- 594. Misconduct of directors of stock corporations.
- 595. Misconduct of directors of banking corporations.
- 596. Loans made in violation of last section, not invalid.
- 597. Sale or hypothecation of bank notes by officer, etc.
- 598. Officer of bank putting excessive number of its notes in circulation.
- 599. Officer or agent of banking corporation, making guaranty or indorsement, in its behalf, in certain cases.
- 600. Bank officer overdrawing his account.
- 601. Receiving deposits in insolvent bank.
- 602. Frauds in keeping accounts, etc.
- 603. Officer of corporation publishing false reports of its condition.
- 604. Insolvencies of corporations deemed fraudulent, when.
- 605. Directors participating in fraudulent insolvency, how punishable.
- 606. Violation of duty of directors of moneyed corporations.
- 607. Railroad company contracting debt in its behalf, exceeding its available means.
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- 609. Directors of corporation presumed to have knowledge of its affairs.
- 610. Director present at meeting, when presumed to have assented to proceedings.
- 611. Director absent from meeting, when presumed to have assented to proceedings.
- 612. Failure of director upon whom application is served, etc.
- 613. Foreign corporations.
- 614. "Director" defined.

§ 590. Funds in subscriptions for stock of corporations.

A person who signs the name of a fictitious person to any subscription for, or agreement to take, stock in any corporation, existing or proposed; and a person who signs, to any subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such

subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

New.

§ 591. **Fraudulent issue of stock, scrip, etc.** — An officer, agent or other person in the service of any joint-stock company, or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who willfully and knowingly, with intent to defraud, either,

1. Sells, pledges or issues, or causes to be sold, pledged, or issued, or signs or executes, or causes to be signed or executed, with intent to sell, pledge, or issue, or to cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or,

2. Re-issues, sells, pledges or disposes of, or causes to be re-issued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares;

Is punishable by imprisonment for not less than three years nor more than seven years, or by a fine not exceeding three thousand dollars, or by both.

Laws 1855. ch. 155, §§ 1, 2.

The officers and directors of a corporation cannot, without legislative sanction, increase the capital of the company or issue certificates of stock beyond its capital; an attempt to do so would be good ground for canceling its charter. (*People v. Parker Vein Coal Co.*, 10 How., 548.)

§ 592. **Frauds in procuring organization of corporation, or increase of capital.** — An officer, agent or clerk, of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board

authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years and not less than three years.

See Laws 1829, ch. 94, § 29.

§ 593. Unauthorized use of names in prospectuses, etc.

A person who, without authority, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.

New.

§ 594. Misconduct of directors of stock corporations.—

A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended,

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law ; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation ; or to reduce such capital stock without the consent of the legislature ; or,

3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment ; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock ; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock ; or,

6. To receive any such shares in payment or satisfaction of a debt due to such corporation ; or,

7. To receive in exchange for the shares, notes, bonds, or other evidences of debt of such corporation, shares of the capital stock or notes, bonds or other evidences of debt issued by any other stock corporation ;

Is guilty of a misdemeanor.

2 R. S., 297, § 1; Laws 1869, ch. 742, § 7.

Power of directors of corporations to contract with themselves as individuals on behalf of the corporation. (*Coleman v. Second Ave. R. R. Co.*, 38 N. Y., 201; 48 Barb., 371.)

The directors of a corporation, as such, have no power to sell any portion of its property which is necessary to transact its customary business. (*Abbott v. Am. Hard Rubber Co.*, 38 Barb., 578.)

A general assignment by the directors of a corporation of all its property is fraudulent and void as to those directors not consenting thereto. (*Smith v. N. Y. Con. Stage Co.*, 18 Abb., 419.)

§ 595. Misconduct of directors of banking corporations. — A director of a corporation, organized under the laws of this state, having banking powers, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either,

1. To make a loan or discount, by which the whole amount of the loans and discounts of the corporation shall be greater than the amount allowed by law, or, where there is no express statutory limitation of the amount, greater than three times its capital stock then paid in and actually possessed ; or,

2. To make a loan or discount to any director of such corporation, or upon paper upon which any such director is responsible to an amount exceeding the amount allowed by statute, or where there is no express statutory limitation of the amount, exceeding in the aggregate one-third of the capital stock of such corporation then paid in and actually possessed ;

Is guilty of a misdemeanor.

2 R. S., 297, § 1.

§ 596. Loans made in violation of last section not invalid. — Nothing in the last section shall render any loan made by the directors of any such corporation, in violation thereof, invalid.

Id., § 1, subd., 6.

§ 597. Sale or hypothecation of bank notes by officer, etc. — An officer or agent of any corporation having banking

powers, who sells or causes or permits to be sold, any bank notes of such corporation, or pledges or hypothecates, or causes or permits to be pledged or hypothecated, with any other corporation, association or individual, any such notes, as a security for a loan or for any liability of such corporation, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

Id., 811, §§ 91, 95; Laws 1842, ch. 247, § 10.

§ 598. **Officer of bank putting excessive number of its notes in circulation.** — An officer or agent of any corporation having banking powers, who issues or puts in circulation, or causes or permits to be issued or put in circulation, the bank notes of such corporation to an amount which, together with previous issues, leaves in circulation or outstanding a greater amount of notes than such corporation is allowed by law to issue and circulate, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

2 R. S., 297, §§ 92, 95; Laws 1842, ch. 247, § 11.

§ 599. **Officer or agent of banking corporation making guaranty or indorsement, in its behalf, in certain cases.** An officer or agent of any banking corporation, who makes or delivers any guaranty or indorsement on behalf of such corporation, whereby it may become liable upon any of its discounted notes, bills or obligations, in a sum beyond the amount of loans and discounts which such corporation may legally make, is guilty of a misdemeanor.

2 R. S., 312, §§ 93, 95; Laws 1841, ch. 292, § 2.

§ 600. **Bank officer overdrawing his account.** — An officer, agent, teller or clerk of any bank, banking association or savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor.

New. (See *State v. Stimson*, 4 Zab., 478.)

§ 601. **Receiving deposits in insolvent bank.** — An officer, agent, teller or clerk of any bank, banking association or savings bank, and every individual banker or agent, and any teller or clerk of an individual banker, who receives any deposits know-

ing that such bank, or association, or banker is insolvent, is guilty of a misdemeanor.

New.

§ 602. **Frauds in keeping accounts, etc.** — A director, officer or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of such corporation or association; and a director, officer, agent or member of any corporation or joint-stock association, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes or concurs in making any false entry, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Laws 1829, ch. 94, § 29; Laws 1843, ch. 218, § 6.

§ 603. **Officer of corporation publishing false reports of its condition.** — A director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are elsewhere, by this Code, specially made punishable, is guilty of a misdemeanor.

Laws 1874, ch. 440, §§ 1, 2.

Officers who publish false statements tending to produce a belief that the stock of a corporation is at least of par value, and that the business is paying a dividend, etc., are liable in an action for deceit. (*Cross v. Sackett*, 6 Abb., 247; *Harper v. Chamberlain*, 11 Abb., 234.)

§ 604. **Insolvencies of corporations deemed fraudulent, when.** — The insolvency of a moneyed corporation is deemed fraudulent unless its affairs appear, upon investigation, to have been administered fairly, legally, and with the same care and

diligence that agents receiving a compensation for their services are bound by law to observe.

2 R. S., 299, § 14.

§ 605. Directors participating in fraudulent insolvency, how punishable. — In every case of the fraudulent insolvency of a moneyed corporation, every director thereof who participated in such fraud, if no other punishment is prescribed therefor by this Code, or any special statute, is guilty of a misdemeanor.

2 R. S., 299, § 15.

§ 606. Violation of duty of directors of moneyed corporations. — A director of any moneyed corporation, who willfully does any act, as such director, which is expressly forbidden by law, or willfully omits to perform any duty expressly imposed upon him as such director, by law, the punishment for which act or omission is not otherwise prescribed by this Code, or by some special statute, is guilty of a misdemeanor.

2 R. S., 298, § 10.

§ 607. Railroad company contracting debt in its behalf, exceeding its available means. — An officer, stockholder or agent of any railway corporation in this state, who knowingly incurs or assents to, or has any agency in contracting or incurring a debt, by or on behalf of such corporation, exceeding its means, available for the payment thereof and of all its debts previously contracted or incurred, then in possession or under its control and belonging to it, including its stock subscriptions, taken in good faith and available, and exclusive of its real estate, is guilty of a misdemeanor.

Laws 1845, ch. 230.

§ 608. Last section limited. — The provisions of the last section do not apply to any loan, which an incorporated railway company in this state is expressly authorized by law to make, over and above its available means. Debts, incurred or contracted in violation of the last section, are not to be deemed invalid as against such corporation by reason thereof.

Id.

§ 609. Directors of corporation presumed to have knowledge of its affairs. — A director of a corporation or

joint-stock association must be deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors, is a violation of this chapter.

2 R. S., 299, § 14.

§ 610. Director present at meeting, when presumed to have assented to proceedings.—A director of a corporation, or joint-stock association, who is present at a meeting of the directors, at which any act, proceeding or omission of such directors in violation of this chapter occurs, must be deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

2 R. S., 298, §§ 12, 13.

§ 611. Director absent from meeting, when presumed to have assented to proceedings.—A director of a corporation, or joint-stock association, although not present at a meeting of the directors, at which any act, proceeding or omission of such directors, in violation of this chapter, occurs, must be deemed to have concurred therein, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, without causing, or in writing requiring, his dissent from such illegality to be entered in the minutes of the directory.

Id.

§ 612. Failure of director upon whom application is served, etc.—A director, trustee or other officer of a joint-stock association or corporation, upon whom a notice of application for an injunction affecting the property or business of such joint-stock association or corporation is served, who omits to disclose to the other directors, officers, or managers thereof, the fact of such service, and the time and place of such application, is guilty of a misdemeanor.

Laws 1870, ch. 151, § 1.

§ 613. Foreign corporations.—It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, govern-

ment or country, if it carried on business, or kept an office therefor, within this state.

New.

§ 614. "**Director**" defined. — The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law.

2 R. S., 304, § 56.

CHAPTER XII.

FRAUDS IN THE SALE OF PASSAGE TICKETS.

SECTION 615. Sale of passage tickets on vessels and railroads forbidden, except by agents specially authorized.

616. Sales by authorized agents, restricted.

617. Unauthorized persons forbidden to sell certificates, receipts, etc., for the purpose of procuring tickets.

618. Punishment for violation of the preceding sections.

619. Conspiring to sell passage tickets in violation of law.

620. Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.

621. Offices kept for unlawful sale of passage tickets declared disorderly houses.

622. Owners, pursers, etc., allowed to sell tickets.

623. Station masters, conductors, etc., allowed to sell tickets.

624. What must be stated in passage tickets.

625. Sale of tickets not filled out as required in last section, a misdemeanor.

626. Certain sales and exchanges of passenger tickets.

627. "Company" defined.

§ 615. Repealed in 1882.

Laws 1857, ch. 470, § 1; Laws 1860, ch. 103; Laws 1868, ch. 820; Laws 1876, ch. 201, § 1.

§ 616. **Sale by authorized agents, restricted.**— No person except as allowed in section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument, giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or

a berth or state-room on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell or offer to sell any such ticket, instrument, berth or state-room, or ask, take or receive any consideration for any such passage, conveyance, berth or state-room, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. But a person who shall have purchased a ticket in good faith for his own passage, and shall have been prevented from using the same, may sell the ticket at any price not greater than the regular rate established therefor, to another person in good faith, for his own use.

Laws 1860, ch. 103, § 2; Laws 1857, ch. 470, § 1; Laws 1868, ch. 820; Laws 1876, ch. 201.

§ 617. Unauthorized persons forbidden to sell certificates, receipts, etc., for the purpose of procuring tickets.—No person other than an agent appointed, as provided in section six hundred and fifteen, shall sell, or offer to sell, or in any way attempt to dispose of any order, certificate, receipt or other instrument, for the purpose, or under the pretense, of procuring any ticket or instrument mentioned in section six hundred and fifteen, upon any company or line, vessel or railway train therein mentioned. And every such order sold or offered for sale by any such agent, must be directed to the company, owners or consignees at their office.

Laws 1860, ch. 103, § 3; Laws 1857, ch. 470; Laws 1868, ch. 820; Laws 1876, ch. 201.

§ 618. Punishment for violation of the preceding sections.—A person guilty of a violation of any of the provisions of the preceding sections of this chapter is punishable by imprisonment in a state prison not exceeding two years, or by imprisonment in a county jail not less than six months.

Laws 1860, ch. 103, § 4; Laws 1857, ch. 470, § 1; Laws 1868, ch. 820; Laws 1876, ch. 201.

§ 619. Conspiring to sell passage tickets in violation of law.—All persons who conspire together to sell or attempt to sell, to any person, any passage ticket, or other instrument men-

tioned in sections six hundred and fifteen and six hundred and sixteen, in violation of those sections, and all persons, who, by means of any such conspiracy, obtain, or attempt to obtain any money or other property, under the pretense of procuring or securing any passage or right of passage in violation of this chapter, are punishable by imprisonment in a state prison not exceeding five years.

Laws 1860, ch. 108, § 5; Laws 1857, ch. 470; Laws 1868, ch. 820; Laws 1870, ch. 108, § 5; Laws 1870, ch. 423.

§ 620. Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.— Persons guilty of violating the last section may be indicted and convicted for a conspiracy, though the object of such conspiracy has not been executed.

Laws 1860, ch. 108, § 6; Laws 1870, ch. 423, § 6; see § 171, *ante*.

§ 621. Offices kept for unlawful sale of passage tickets, declared disorderly houses.— All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this chapter, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this chapter, are punishable by imprisonment in a county jail, for a period not exceeding six months, and not less than three months.

Laws 1860, ch. 108, § 7; Laws 1870, ch. 423.

§ 622. Owners, pursers, etc., allowed to sell tickets.— The provisions of this chapter do not prevent the actual owners or consignees of any vessel, from selling passage tickets thereon; nor do they prevent the purser or clerk of any vessel from selling in his office on board of such vessel, any passage tickets upon such vessel.

Laws 1860, ch. 108, § 9; amended, Laws 1876, ch. 201, § 2.

§ 623. Station masters, conductors, etc., allowed to sell tickets.— The provisions of this chapter do not prevent the station master or other ticket agent upon any railway, from selling in his office at any station on such railway, any passage tickets upon such railway; nor do they prevent any conductor upon

a railway from selling such tickets upon the trains of such railway.

New.

§ 624. **What must be stated in passage tickets.**—A ticket or instrument issued as evidence of a right of passage upon the high seas, from any port in this state to any port of any other state or nation, and every certificate or order issued for the purpose, or under pretense of procuring any such ticket or instrument, and every receipt for money paid for such ticket or instrument must state the name of the vessel on board of which the passage is to be made, the name of the owners or consignees of such vessel, the name of the company, or line, if any, to which such vessel belongs, the place from which such passage is to commence, the place where such passage is to terminate, the day of the month and year upon which the voyage is to commence, the name of the person or persons purchasing such ticket or instrument, or receiving such order, certificate or receipt, and the amount paid therefor; and such ticket or instrument, order, certificate or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent.

Laws 1860, ch. 103, § 11.

§ 625. **Sale of tickets not filled out as required in last section, a misdemeanor.**—A person who issues, sells or delivers to another, any ticket, instrument, certificate, order or receipt, which is not made or filled out as prescribed in the last section, is guilty of a misdemeanor.

Id.

§ 626. **Certain sales and exchanges of passenger tickets.**
A person who,

1. Sells, or causes to be sold, a passage ticket, or order for such ticket, on any railway, vehicle or vessel, to any emigrant passenger at a higher rate than one and a-quarter cents per mile; or,

2. Takes payment for any such ticket or order for a ticket under a false representation as to the class of the ticket, whether emigrant or first-class; or,

3. Directly or indirectly, by means of false representations, purchases or receives from an emigrant passenger any such ticket; or,

4. Procures or solicits any such passenger having such a ticket to exchange the same for another passenger ticket, or to sell the same and purchase some other passenger ticket ; or,

5. Solicits or books any passenger arriving at the port of New York from a foreign country before such passenger has left the vessel on which he has arrived, or enters or goes on board any vessel arriving at the port of New York from a foreign country, having emigrant passengers on board, for the purpose of soliciting or booking such passengers ; and a person or agent of a corporation employing any person for the purpose of booking such passengers before leaving the ship ;

Is guilty of a misdemeanor.

1 R. S., 1087, §§ 78, 79, 81; Laws 1853, ch. 218, §§ 7, 8, 9; Laws 1855, ch. 474, §§ 1, 3, 4.

§ 627. "**Company**" defined.—The term "company," as used in this chapter, includes all corporations, whether created under the laws of this state or of the United States, or those of any other state or nation.

Laws 1860, ch. 103, § 18.

CHAPTER XIII.

FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.

SECTION 628. Issuing fictitious bills of lading, etc.

629. Issuing fictitious warehouse receipts.

630. Erroneous bills of lading or receipts, issued in good faith, excepted.

631. Duplicate receipts must be marked "duplicate."

632. Selling, hypothecating or pledging property received for transportation or storage.

633. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.

634. Property demanded by process of law.

§ 628. **Issuing fictitious bills of lading, etc.**—A person being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless

the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

2 R. S., 229; Laws 1858, ch. 326, § 5; Laws 1859, ch. 353; Laws 1866, ch. 440.

§ 629. **Issuing fictitious warehouse receipts.** — A person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading or other voucher for merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness; is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

2 R. S., 229, §§ 1, 2; Laws 1858, ch. 326, § 1; amended, Laws 1866, ch. 440.

§ 630. **Erroneous bills of lading or receipts, issued in good faith, excepted.** — No person can be convicted of an offense under the last two sections, for the reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels or brands were untrue.

New. (See *Blossom v. Champion*, 37 Barb., 554.)

§ 631. **Duplicate receipts must be marked "duplicate."** — A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable

by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

2 R. S., 229, §§ 1, 2; Laws 1858, ch. 326, § 8; amended, Laws 1866, ch. 440.

A bill of lading is always open to correction and explanation as between the parties. (*Wolfe v. Meyers*, 3 Sandf., 7; *Meyer v. Peak*, 28 N. Y., 590.)

§ 632. Selling, hypothecating or pledging property received for transportation or storage.—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who sells or pledges any merchandise for which a bill of lading, receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

2 R. S., 229, § 4; Laws 1858, ch. 326; Laws 1859, ch. 353; Laws 1866, ch. 440.

§ 633. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.—A person mentioned in section three hundred and twenty-nine, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

2 R. S., 229, § 6; Laws 1858, ch. 326, § 6; amended, Laws 1859, ch. 353.

§ 634. Property demanded by process of law.—The last two sections do not apply to any case where property is demanded by virtue of legal process.

2 R. S., 229, § 8.

As where property named in bill of lading is retained under process of replevin. (*Zachrisson v. Ahman*, 2 Sandf., 68; see, also, *Keyser v. Harbeck*, 3 Duer, 373.)

CHAPTER XIV.

MALICIOUS MISCHIEFS AND OTHER INJURIES TO PROPERTY.

- SECTION 635. Injury to railroad track, etc., how punished.
- 636. Damaging building, etc., by explosion.
 - 637. Burning certain property, how punished.
 - 638. Altering, etc., signal or light for vessel, etc.
 - 639. Injuring highway boundary, pier, sea-wall, dock, lock, buoy, landmark, mile board pipe, main, sewer, machine, telegraph, poisoning well, etc.
 - 640. Malicious injury and destruction of property.
 - 641. Divulging, etc., telegram, a misdemeanor.
 - 642. Opening or publishing a sealed letter, etc.
 - 643. Affixing advertisement to another's land, etc., how punished.
 - 644. Presumptive evidence against certain persons.
 - 645. Endangering life by maliciously placing explosive near building.
 - 646. Malicious injury to standing crops, when a misdemeanor.
 - 647. Willful injury to works of art, etc., a misdemeanor.
 - 648. Malicious injury to certain articles in museum, etc., how punished.
 - 649. Destroying or delay of election returns.
 - 650. Property in house of worship, etc.
 - 651. Unlawful interference with gas meter.
 - 652. Driving vehicle, etc., on sidewalks.
 - 653. Coercing another person a misdemeanor.
 - 654. Injury to other property, how punished.

§ 635. Injury to railroad track, etc., how punished. —

A person who,

1. Displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment or structure, or any part thereof, attached or appertaining to or connected with a railway, whether operated by steam or by horses; or,
2. Places any obstruction upon the track of such a railway; or,
3. Willfully discharges a loaded fire-arm, or projects or throws a stone or any other missile at a railway train, or at a locomotive, car or vehicle standing or moving upon a railway;

Is punishable as follows:

1. If thereby the safety of any person is endangered, by imprisonment for not more than ten years;
2. In every other case, by imprisonment for not more than three years, or by a fine of not more than two hundred and fifty dollars, or both.

§ 636. **Damaging building, etc., by explosion.** — A person who unlawfully and maliciously, by the explosion of gunpowder, or any other explosive substance, destroys or damages any building or vessel, is punishable as follows :

1. If thereby the life or safety of a human being is endangered, by imprisonment for not more than ten years ;

2. In every other case by imprisonment for not more than five years.

New. (See § 201, *ante*, and § 645, *post*.)

§ 637. **Burning certain property, how punished.** — A person who willfully burns or sets fire to any grain, grass, or growing crop, or standing timber, or to any building, fixtures or appurtenances to real property of another, under circumstances not amounting to arson in any of its degrees, is punishable by imprisonment for not more than four years.

3 R. S., 969, §§ 8, 9; Laws 1817, p. 118; Laws 1827, p. 244; see § 486, *ante*.

§ 638. **Altering, etc., signal or light for vessel, etc.** — A person who, with intent to bring a vessel, railway engine, or railway train into danger, either,

1. Unlawfully or wrongfully shows, masks, extinguishes, alters, or removes a light or other signal ; or,

2. Exhibits any false light or signal ;

Is punishable by imprisonment for not more than ten years.

New.

§ 639. **Injuring highway boundary, pier, sea wall, dock, lock, buoy, landmark, mile board, pipe, main, sewer, machine, telegraph, etc.** — A person who willfully or maliciously displaces, removes, injures or destroys,

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way ; or,

2. A pier, boom, or dam, lawfully erected or maintained upon any water within the state, or hoists any gate in or about such dam ; or,

3. A pile, or other material, fixed in the ground and used for securing any sea-bank or sea-walls, or the bank or dam of any river or other water, or any dock, quay, jetty, or lock ; or,

4. A buoy or beacon, lawfully placed in any waters within the state ; or,

5. A tree, rock, post, or other monument, which has been either erected or marked for the purpose of designating a point in the boundary of the state, or of a county, city, town, or village, or of a farm, tract or lot of land, or any mark or inscription thereon; or,

6. A mile-board, mile-stone, or guide-post, erected upon a highway, or any inscription upon the same; or,

7. A line of telegraph, or any part thereof, or any appurtenance or apparatus connected with the working of any magnetic or electric telegraph, or the sending or conveyance of messages by any such telegraph; or,

8. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenance or appendage connected therewith; or,

9. A sewer or drain, or a pipe or main connected therewith, or forming a part thereof; or who,

10. Destroys or damages with intent to destroy or render useless any engine, machine, tool or implement intended for use in trade or husbandry;

Is punishable by imprisonment for not more than two years.

Subd. (1) — 3 R. S., 976, § 56; 2 R. S. (Edm.), 718, § 80.

Subd. (2) — Id., 976, § 57; Id., § 81.

Subd. (3) — Id.; Id.

Subd. (4) — 2 R. S., 204, § 94; Laws 1857, ch. 671, § 11; Laws 1858, ch. 236.

Subd. (5) — 3 R. S., 976, § 58; 2 R. S. (Edm.), 718, § 82.

Subd. (6) — Id., 977, § 59; Id., § 83.

Subd. (7) — Id., 983, § 100; Laws 1870, ch. 491.

Subd. (8) — Laws 1860, ch. 172, § 7; Laws 1854, ch. 109, § 1.

Subd. (9) — Laws 1854, ch. 109, §§ 1, 2.

Subd. (10) — New.

Code Crim. Proc., § 56.

§ 640. Malicious injury and destruction of property. —

A person who willfully,

1. Cuts down, destroys or injures any wood or timber standing or growing, or which has been cut down and is lying on lands of another, or of the people of the state; or,

2. Cuts down, girdles or otherwise injures a fruit, shade or ornamental tree standing on the lands of another, or of the people of the state; or,

3. Severs from the freehold of another, or of the people of the state, any produce thereof, or anything attached thereto; or,

4. Digs, takes or carries away without lawful authority or consent from any lot of land in any incorporated city or village, or from any lands included within the limits of a street or avenue laid down on the map of such city or village, or otherwise recognized or established, any earth, soil or stone; or,

5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy anything there growing or grown; or,

6. Cuts down, destroys, or in any way injures any shrub, tree or vine being or growing within any such orchard, garden, vineyard, or upon any such ground, or any building, frame work or erection thereon; or,

7. Maliciously injures any ice upon any waters from which ice is taken as an article of merchandise, with intent to injure the owner thereof, or enters or skates upon any pond or body of water not navigable, kept and used for the purpose of taking ice therefrom as an article of merchandise, and upon or adjoining which a notice has been placed in a conspicuous position forbidding such entry, and stating the purpose for which said body of water is kept or used, or puts or throws upon or into any such pond or body of water any stick, stone or other substance to the injury of the ice or water; or,

8. Unlawfully takes or carries away by any means the oysters or other shell-fish of another, legally planted upon the bed of any river, bay, sound or water; or removes, pulls up or destroys any stake designating or marking out the legally planted oyster-bed of another; or,

9. Intrudes, or places any hovel, shanty or building upon, or within the limits of any lot or piece of land within any incorporated city or village, without the consent of the owner, or within the boundary of any street or avenue within such city or village; or,

10. Kills, wounds or traps any bird, deer, squirrel, rabbit or other animal within the limits of any cemetery or public burying ground, or of any public park or pleasure ground, or removes the young of any such animal, or the eggs of any such bird, from any cemetery, park or pleasure ground, or exposes for sale, or knowingly buys or sells any bird or animal so killed or taken; or,

11. Drives or leads, or causes to be led or driven along any

road or highway any wild and dangerous animal, unless a person of full age precedes such animal at least a half a mile, to give warning of its approach;

Is punishable by imprisonment not exceeding six months, or a fine not exceeding two hundred and fifty dollars, or both.

3 R. S., 971, § 15.

Subd. (1) — Id., 601, § 1.

Subd. (2) — Id., 971, § 75.

Subd. (3) — Id.

Subd. (4) — Id.

Subd. (5) — Id., 981, § 90; Laws 1868, ch. 645, § 1.

Subd. (6) — Id., 982, § 91; Laws 1868, ch. 645, § 2.

Subd. (7) — Id., 968, § 34; Laws 1868, ch. 229, §§ 1, 2.

Subd. (8) — 3 R. S., 982, § 97; Laws 1860, ch. 753, § 1.

Subd. (9) — Id., 984, § 109; Laws 1857, ch. 396, § 1.

Subd. (10) — Id., 985, §§ 113, 114; Laws 1858, ch. 629, §§ 1, 2.

Subd. (11) — Id., 984, § 19; Laws 1863, ch. 112, § 1.

See, also, §§ 195, 196, 467, 537, *ante*, and § 646, *post*; also, Code Crim. Proc., § 50.

(a) **Personal property.** — The wanton, malicious and secret destruction of the personal property of another is a misdemeanor at common law. (*People v. Moody*, 5 Park., 568.)

(b) **Killing a cow.** — An indictment lies for willfully and maliciously killing a cow, the property of another. (*People v. Smith*, 5 Cow., 258; *State v. Wilson*, 3 Mo., 125; *Bock v. State*, 50 Ind., 281.)

(c) **Must result in injury.** — A malicious act, however wanton or dangerous, which does not result in injury to property, does not amount to malicious mischief. (*Wait v. Green*, 5 Park., 185.)

(d) **Simple trespass.** — A simple trespass does not amount to this offense, unless it consists in injury to property or cruelty to animals. (*Williams v. People*, 24 How., 350.)

(e) **Growing trees.** — In an indictment for injuring growing trees, what must be averred. (*People v. Harr*, 7 Barb., 9.)

Malicious mischief done to any kind of property is a misdemeanor. (*Loomis v. Edgerton*, 19 Wend., 417, 419.)

(f) **Growing crops.** — Severing and carrying away by one act growing crops of less value than twenty-five dollars is malicious trespass, but not stealing. (*Comfort v. Fulton*, 39 Barb., 56; *People v. Blake*, 1 Wh. Cr. C., 490.)

(g) **Breaking windows.** — Breaking of windows by force, etc. (*Kilpatrick v. People*, 5 Den., 277.)

Maliciously killing or wounding domestic animals. (*Id.*)

(h) **Essence of the offense.** — The essence of the offense is the injury to property. (*Wait v. Green*, 5 Park., 185; 26 Ohio St., 265.)

(i) **Rightful or wrongful possession.** — Whether the possession to the property was rightful or wrongful. (*People v. Harr*, 7 Barb., 9; *Wendson v. State*, 13 Ind., 375; *Palmer v. State*, 45 id., 388; *State v. Leavitt*, 33 Me., 183.)

Or title be in dispute between parties. (4 *Moody & R.*, 481.)

(j) **Malice is the gravamen of the offense.** — 43 Ala., 330; 44 id., 380; 72 N. C., 201.

Malicious injury to animals is indictable at common law. (4 Cranch C. C., 483; 28 Ga., 190; 26 Ohio St., 176; 8 Met., 232; 5 Den., 277; 44 N. H., 392.)

An offense at common law to shoot or wound stock found trespassing on one's premises. (19 Ill., 80.)

But the malice may be negatived by showing that the trespassing animal was vicious and dangerous. (19 Ill., 80; 30 Ga., 325; 3 Cox C. C., 505.)

(k) **Real estate.** — Real estate, as well as personal property, is protected. (3 Mo., 125; 5 Allen, 2.)

In mischief to buildings malicious intent is especially essential. (110 Mass., 401.)

Where a traveler refused to pay toll and sawed down the toll-gate it was malicious mischief. (50 Ind., 281.)

(l) **Fences.** — Tearing down a fence also. (59 Ill., 68.)

To constitute malicious mischief as to trees and timber, there must be a malicious entry. (6 Gray, 349; Russ. & R., 373.)

Girdling or injuring trees is malicious mischief. (2 Browne [Penn.], 249.)

(m) **Machinery.** — Also an indictment lies for willful injury to machinery. (4 Carr. & P., 449; 1 Moody & R., 549; Russ. & R., 452; 10 Cox C. C., 146.)

§ 641. **Divulging, etc., telegram, a misdemeanor.** — A person who, either,

1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employe of a telegraph company; or,

2. Being such clerk, operator, messenger or other employe, willfully divulges, to any but the persons for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuses or neglects duly to transmit or deliver the same;

Is punishable by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment.

3 R. S., 976, §§ 53, 54; Laws 1867, ch. 861; 2 R. S. (Edm.), 717, § 27.

§ 642. **Opening or publishing a letter, etc.** — A person who willfully and without authority, either,

1. Opens or reads, or causes to be opened or read, a sealed letter or telegram; or,

2. Publishes the whole or any portion of such a letter or telegram, knowing it to have been opened or read without authority;

Is guilty of a misdemeanor.

3 R. S., 976, §§ 53, 54; 2 R. S. (Edm.), 717, §§ 27, 28; Laws 1867, ch. 861; see *Noule's case*, 3 C. H. Rec., 13; *U. S. v. Eddy*, 1 Bis., 237.

§ 643. **Affixing advertisement to another's land, etc., how punished.** — A person who places upon or affixes to, or causes or procures to be placed upon or affixed to, real property not his own, or a rock, tree, wall, fence, or other structure thereupon, without the consent of the owner, any words, characters, or device, as a notice of, or reference to, any article, business, exhibition, profession, matter or event, is punishable by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both.

8 R. S., 985, § 112; Laws 1853, ch. 573; Laws 1865, ch. 222.

§ 644. **Presumptive evidence against certain persons.** The placing or affixing of any words, characters, device or notice of any article, business, or other thing, to or upon any property or place specified in the last section, is presumptive evidence that the proprietor, vendor or exhibitor thereof caused or procured the same to be so placed or affixed.

Laws 1853, ch. 573; Laws 1865, ch. 222.

§ 645. **Endangering life by maliciously placing explosive near building.** — A person who places in, upon, under, against or near to, any building, car, vessel or structure, gunpowder or any other explosive substance, with intent to destroy, throw down or injure the whole or any part thereof, under such circumstances, that, if the intent were accomplished, human life or safety would be endangered thereby, although no damage is done, is guilty of a felony.

New. (See §§ 201, 389, 636, *ante*, and cases cited under § 389, *ante*.)

§ 646. **Malicious injury to standing crops, when a misdemeanor.** — A person, who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which punishment is not otherwise prescribed by this Code, or by some other statute, is guilty of a misdemeanor.

Laws 1868, ch. 645, §§ 1, 2; *People v. Harr*, 7 Barb., 9.

§ 647. **Willful injury to works of art, etc., a misdemeanor.** — A person who, not being the owner thereof, and without lawful authority, willfully injures, disfigures, removes or destroys a gravestone, monument, work of art, or useful or ornamental improvement, or any shade tree or ornamental plant,

whether situated upon private ground or upon a street, road or sidewalk, cemetery or public park or place, or removes from any grave in a cemetery any flowers, memorials or other tokens of affection, or other thing connected with them, is guilty of a misdemeanor.

3 R. S., 985, § 112; Laws 1853, ch. 573; amended, Laws 1865, ch. 422; Laws 1873, ch. 190.

The trustees of a village have authority, under a charter, to impose penalties for the destruction of shade trees on a village street. (*Village of Lancaster v. Richardson*, 4 Lans., 222.)

However, trees standing on streets and highways of which the soil belongs to adjacent owners, may be removed by them at pleasure. (Id.; see, also, *Niagara Falls and Susp. Bridge Co. v. Bachman*, 4 Lans., 523.)

§ 648. **Malicious injury to certain articles in museum, etc., how punished.**—A person who maliciously cuts, tears, defaces, disfigures, soils, obliterates, breaks or destroys, a book, map, chart, picture, engraving, statue, coin, model, apparatus, specimen, or other work of literature or object of art, or curiosity, deposited in a public library, gallery, museum, collection, fair or exhibition, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

New.

§ 649. **Destroying or delay of election returns.**—A messenger appointed by authority of law to receive and carry a report, certificate or certified copy of any statement relating to the result of any election, who willfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and a person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who willfully does any injury or other act in this section specified, is punishable by imprisonment in a state prison not exceeding five years, and not less than two years.

1 R. S., 449, §§ 18, 19; Laws 1880, ch. 56, §§ 14-21.

§ 650. **Property in house of worship, etc.**—A person, who willfully and without authority, breaks, defaces or otherwise injures any house of religious worship, or any part thereof, or any appurtenances thereto, or any book, furniture, ornament,

musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship, is guilty of felony.

New.

§ 651. **Unlawful interference with gas meter.**—A person who, willfully with intent to injure or defraud, connect a tube, pipe, or other instrument or contrivance, with a pipe used for conducting or supplying illuminating gas, in such a manner as to supply such gas to any burner or orifice, where the same is or can be burned or used, without passing through the meter or instrument provided for registering the quantity consumed; or who obstructs, alters, injures, or prevents the action of a meter or other instrument used to measure or register the quantity of illuminating gas consumed in a house or apartment, or at an orifice or burner, or by a consumer or other person, is guilty of a misdemeanor.

3 R. S., 986, §§ 116, 117; Laws 1854, ch. 109, § 2.

§ 652. **Driving vehicle, etc., on sidewalks.**—A person who willfully and without authority drives any team, vehicle, cattle, sheep, horse, swine, or other animal along upon a sidewalk is punishable by a fine of fifty dollars, or imprisonment in a county jail not exceeding thirty days, or by both.

Laws 1860, ch. 61, § 1; also Laws 1863, ch. 98.

§ 653. (Amended 1882.) **Coercing another person, a misdemeanor.**—A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property, or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement, or clothing, or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force;

Is guilty of a misdemeanor.

New. (See § 168, subd. 5, *ante*; § 673, *post*.)

§ 654. **Injury to other property, how punished.**—A person who unlawfully and willfully destroys or injures any real

or personal property of another, in a case where the punishment thereof is not specially prescribed by statute, is punishable as follows :

1. If the value of the property destroyed, or the diminution in the value of the property by the injury is more than twenty-five dollars, by imprisonment for not more than four years ;

2. In any other case, by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

3. And in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof.

New. (See § 640, *ante*.)

The wanton destruction of personal property was a misdemeanor at common law. (*People v. Moody*, 5 Park., 568; see, also, *People v. Smith*, 5 Cow., 358; *Wait v. Greene*, 5 Park., 185, and cases cited under § 640, *ante*.)

TITLE XVI.

CRUELTY TO ANIMALS.

SECTION 655. Overdriving animal; failing to provide proper sustenance.

656. Abandonment of disabled animal.

657. Failure to provide proper food and drink to impounded animal.

658. Selling or offering to sell or exposing disabled animal.

659. Carrying animal in a cruel manner a misdemeanor.

660. Animal wantonly poisoned, or attempted to be poisoned, a misdemeanor.

661. Throwing substance injurious to animals in public place a misdemeanor.

662. Keeping milch cows in unhealthy places, and feeding them with food producing unwholesome milk, a misdemeanor.

663. Transporting animals for more than twenty-four consecutive hours a misdemeanor.

664. Setting on foot fights between birds and animals a misdemeanor.

665. Keeping, etc., a place where animals are fought a misdemeanor.

666. Running horses on highway a misdemeanor.

667. Leaving state to elude provisions of this title.

668. Fines and penalties to be paid over to a society.

669. Definitions.

§ 655. Overdriving animal ; failing to provide proper sustenance. — A person who overdrives, overloads, tortures or

cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor.

3 R. S., §§ 32, 34; Laws 1866, ch. 682; Laws 1867, ch. 375, § 1.

(a) **Slaughtering hogs.**—A cruel mode of slaughtering hogs is indictable under the law of 1866. (*Davis v. The Society for the Prevention of Cruelty to Animals*, 16 Abb. [N. S.], 73.)

(b) **Drivers of street car.**—The driver and conductor of a railroad car is indictable under the statute for overloading a city railway car, though acting under order from the company. (*People v. Tinsdale*, 10 Abb. [N. S.], 374.)

Whether or not car was overloaded is a question for the jury. (*Id.*)

Form of indictment for such an offense. (*Id.*)

(c) **Sick horses.**—Driving a horse in ignorance that it is sick or sore not an offense. (*Broadway Stage Co. v. Am. Soc., etc.*, 15 Abb. [N. S.], 51.)

An agent of the society can only arrest without a warrant when the offense is committed in his presence. (*Id.*)

(d) **Overdriving.**—What will amount to an indictable offense in overdriving a sick horse. (*People v. Brunell*, 48 How. Pr., 435.)

(e) **Cruelty to dogs.**—It is no crime to use a dog upon a treadmill or in any other serviceable employment if the party be not guilty of cruelty. (*People v. Spec. Sess.*, 4 Hun, 441.)

(f) **Shooting a dog.**—In prosecuting a man for shooting a dog the indictment must state that the shooting was malicious and needless. (*Warren v. Perry*, 14 Hun, 337; see, also, *Ross' case*, 3 C. H. Rec., 191; *Morris' case*, 6 id., 62; *Lachine's case*, 4 id., 26.)

Cruelty to a brute cannot be justified, and in all cases the court will severely punish the offender. (*People v. Stokes*, 1 Wh. Cr. C., 111.)

Under the law of 1867, an officer of the society for the prevention of cruelty, etc., duly appointed can arrest an offender without warrant. (*Davis v. Am. Society, etc.*, 75 N. Y., 362.)

Whether or not a person is guilty under the law is a question for the jury (*Id.*)

656. Abandonment of disabled animal.—A person being the owner or possessor, or having charge or custody of a maimed, diseased, disabled or infirm animal, who abandons such animal, or leaves it to die in a street, road or public place, or who allows it

to lie in a public street, road or public place, more than three hours after he receives notice that it is left disabled, is guilty of a misdemeanor.

3 R. S., 974, §§ 33, 34; Laws 1867, ch. 375, § 7; Laws 1866, ch. 682, § 2.

§ 657. Failure to provide proper food and drink to impounded animals. — A person who, having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor.

3 R. S., 974, § 36; Laws 1857, ch. 375, §§ 3, 4.

§ 658. Selling or offering to sell or exposing disabled animal. — A person who willfully sells or offers to sell, uses, exposes, or causes or permits to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or other contagious or infectious disease dangerous to the life or health of human beings, or animals, or which is diseased past recovery, or who refuses upon demand to deprive of life an animal affected with any such disease, is guilty of a misdemeanor.

Laws 1878, ch. 28, § 1; Laws 1874, ch. 12, § 4.

§ 659. Carrying animal in a cruel manner, a misdemeanor. — A person who carries or causes to be carried in or upon any vessel or vehicle or otherwise, any animal in a cruel or inhuman manner, or so as to produce torture, is guilty of a misdemeanor.

3 R. S., 974, § 38; Laws 1880, ch. 209; Laws 1867, ch. 375, § 5; § 663 *post*.

§ 660. Animal wantonly poisoned, or attempted to be poisoned, a misdemeanor. — A person who unjustifiably administers any poisonous or noxious drug or substance to an animal, or unjustifiably exposes any such drug or substance with intent that the same shall be taken by an animal, whether such animal be the property of himself or another, is guilty of a misdemeanor.

3 R. S., 966, § 21; 2 R. S. (Edm.), 711, § 16; Code Crim. Proc., § 56.

§ 661. Throwing substance injurious to animals in public place, a misdemeanor. — A person who throws or places, or causes to be thrown or placed upon any road, highway,

street or public place, except upon the curves, or switches of railway tracks, any salt or saltpetre or other substance producing a freezing mixture to dissolve or remove any snow or ice therefrom, or who willfully throws, drops or places, or causes to be thrown, dropped or placed thereon, any nails, pieces of metal, or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor.

Laws 1876, ch. 16.

§ 662. Keeping milch cows in unhealthy places and feeding them with food producing unwholesome milk, a misdemeanor.— A person who keeps a cow or any animal for the production of milk, in a crowded or unhealthy place, or in a diseased condition, or feeds such cow or animal upon any food that produces impure or unwholesome milk, is punishable by a fine not less than fifty dollars, or imprisonment not exceeding one year, or by both.

1 R. S., 1105, §§ 85, 87; Laws 1863, ch. 467, § 1; amended, Laws 1864, ch. 544.

§ 663. Transporting animals for more than twenty-four consecutive hours, a misdemeanor.— A railway corporation, or an owner, agent, consignee, or person in charge of any horses, sheep, cattle, or swine, in the course of, or for transportation, who confines, or causes or suffers the same to be confined, in cars for a longer period than twenty-four consecutive hours, without unloading for rest, water and feeding, during ten consecutive hours, unless prevented by storm or inevitable accident, is guilty of a misdemeanor. In estimating such confinement, the time during which the animals have been confined without rest, on connecting roads from which they are received, must be computed. If the owner, agent, consignee, or other person in charge of any such animals refuses or neglects upon demand to pay for the care or feed of the animals while so unloaded or rested, the railway company, or other carriers thereof, may charge the expense thereof to the owner or consignee and shall have a lien thereon for such expense.

3 R. S., 974, § 83; Laws 1866, ch. 560, § 1.

§ 664. Setting on foot fights between birds and animals, a misdemeanor.— A person who sets on foot, instigates, pro-

motes, or carries on, or does any act as assistant, umpire, or principal, or is a witness of, or in any way aids in or engages in the furtherance of any fight between cocks or other birds, or dogs, bulls, bears, or other animals, premeditated by any person owning, or having custody of such birds or animals, is guilty of a misdemeanor punishable by fine not less than ten dollars, nor more than one thousand dollars, or by imprisonment not less than ten days nor more than one year, or both.

3 R. S., 975, § 44; Laws 1867, ch. 375, § 2; Laws 1874, ch. 12.

§ 665. **Keeping, etc., a place where animals are fought, a misdemeanor.**— A person who keeps or uses, or is in any way connected with, or interested in the management of, or receives money for the admission of any person to, a house, apartment, pit or place kept or used for baiting or fighting any bird or animal, and any owner or occupant of a house, apartment, pit or place, who willfully procures or permits the same to be used or occupied for such baiting or fighting, is guilty of a misdemeanor.

3 R. S., 974, § 35; Laws 1867, ch. 375, § 2; Laws 1874, ch. 340.

§ 666. **Running horses on highway, a misdemeanor.**— A person driving any vehicle upon any plank road, turnpike or public highway, who unjustifiably runs the horses drawing the same, or causes, or permits, them to run, is guilty of a misdemeanor.

3 R. S., 983, § 4; Laws 1824, p. 347, § 2; Laws 1826, p. 254, §§ 6, 7, 9; Code Crim. Proc., §§ 56, 57.

§ 667. **Leaving state to elude provisions of this title.**— A person who leaves this state with intent to elude any of the provisions of this title or to commit any act out of this state which is prohibited by them, or who, being a resident of this state, does any act without this state, pursuant to such intent, which would be punishable under such provisions, if committed within this state, is punishable in the same manner as if such act had been committed within this state.

New.

§ 668. **Fines and penalties to be paid over to certain societies.**— All fines, penalties or forfeitures imposed or collected for a violation of the provisions of this title, or of any

act for the prevention or punishment of cruelty to animals, now in force, or hereafter passed, must be paid on demand to the American Society for the Prevention of Cruelty to Animals; and an agent of that society has the same power to arrest, in respect to acts of cruelty to animals, as is conferred by section two hundred and ninety-three of this Code, on the agent of an incorporated society for the prevention of cruelty to children, in respect to acts of cruelty to children.

3 R. S., 975, §§ 41, 45, 49; Laws 1874, ch. 12, § 6.

Powers of arrest, etc., by agent of society. (15 Abb. Pr. [N. S.], 59.)

§ 669. **Definitions.** — 1. The word “animal,” as used in this title, does not include the human race, but includes every other living creature;

2. The word “torture” or “cruelty” includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted;

3. The words “impure and unwholesome milk” include all milk obtained from animals in a diseased or unhealthy condition, or who are fed on distillery waste, usually called “swill” or upon any substance in a state of putrefaction or fermentation.

3 R. S., 976, § 51; Laws 1874, ch. 12, § 8; Laws 1862, ch. 467, § 4.

TITLE XVII.

OF MISCELLANEOUS CRIMES.

SECTION 670. Attorneys forbidden to defend criminal prosecution carried on by their partners, or formerly by themselves.

671. Attorneys may defend themselves.

672. Fraudulently presenting bills or claims to public officers for payment.

673. Endangering life by refusal to labor.

674. Publishing false messages.

675. Acts not expressly forbidden.

676. Acts committed out of the state.

§ 670. **Attorneys forbidden to defend criminal prosecutions carried on by their partners, or formerly by themselves.** — An attorney, who directly or indirectly advises in relation to, or aids or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided or

promoted by a person as district attorney or other public prosecutor, with whom such attorney is directly or indirectly connected as a partner; or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise; or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor.

1 R. S., 915, §§ 290, 291, 292; 4 R. S. (Edm.), 554, §§ 1, 2; Code Civ. Proc., §§ 78, 79, 80; Laws 1846, ch. 120, § 8; see §§ 136, 139, 148, 149, *ante*.

§ 671. **Attorneys may defend themselves.** — The last section does not affect sections seventy-eight, seventy-nine, eighty and eighty-one of the Code of Civil Procedure, and does not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally.

1 R. S., 915, § 298; Laws 1846, ch. 120, § 4; Code Civ. Proc., § 81.

§ 672. **Fraudulently presenting bills or claims to public officers for payment.** — A person who, knowingly, with intent to defraud, presents, for audit, or allowance, or for payment, to any officer or board of officers of the state, or of any county, town, city or village, authorized to audit, or allow, or to pay bills, claims or charges, any false or fraudulent claim, bill, account, writing or voucher, or any bill, account or demand, containing false or fraudulent charges, items or claims, is guilty of a felony.

Laws 1875, ch. 19, § 1; §§ 165, 166, *ante*.

§ 673. **Endangering life by refusal to labor.** — A person who willfully and maliciously, either alone or in combination with others, breaks a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanor.

New. (See §§ 168, 170, 658, *ante*.)

§ 674. **Publishing false messages.** — A person who prints, publishes or circulates, as true, any message, order or proclama-

tion purporting to be the message, order or proclamation of the executive of the United States or of this state, or of any other state of the United States now or hereafter admitted, or of any territory of the United States, knowing the same not to be genuine, is punishable by imprisonment in a state prison not exceeding five years, or by fine not exceeding one thousand dollars, or by both. An indictment for this offense may be found in any county in which the message, address or proclamation is printed, published or circulated but not in more than one county of the state.

New.

§ 675. (Amended 1882.) **Acts not expressly forbidden.**—A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this Code, is guilty of a misdemeanor; but nothing in this Code contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them as shall be a just and fair compensation for services rendered.

New.

§ 676. **Acts committed out of the state.**—A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state.

New. (See Laws, 1884, ch. 281.)

TITLE XVIII.

GENERAL PROVISIONS.

SECTION 677. When crimes punishable in different ways.

- 678. Acts punishable under foreign law.
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- 686. Attempts to commit crimes.
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- 720. Application of this Code to prior offenses.
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SECTION 722. Civil remedies, preserved.

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725. Certain statutes continuing in force.

726. General repeal.

727. When act to take effect.

§ 677. **When crimes punishable in different ways.**—An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision.

New. (See U. S. Const., fifth amendment; *Ex parte Lange*, 18 Wall. [U. S.], 188; *State v. Inness*, 53 Me., 536; *Com. v. McShane*, 110 Mass., 502.)

§ 678. **Acts punishable under foreign laws.**—An act or omission declared punishable by this Code, is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in this Code.

New. (See § 676, *ante*.)

§ 679. **Foreign conviction or acquittal.**—Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of the state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

3 R. S., 988, § 4; *Id.*, 929, § 7; 2 R. S. (Edm.), 725, § 25; U. S. Const., fifth amendment; Code Civ. Proc., 189; see *People v. Caesar*, 1 Park., 645.

§ 680. **Contempt, how punishable.**—A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

3 R. S., 442, § 14; 2 R. S. (Edm.), 557, § 25; Code Civ. Proc., §§ 18, 2287; see, also, § 143, *ante*.

§ 681. **Mitigation of punishment in certain cases.**—Where it appears, at the time of passing sentence on a person convicted, that he has already paid a fine or suffered an impris-

onment for the act of which he stands convicted, under an order adjudging it a contempt, the court, passing sentence, may mitigate the punishment to be imposed, in its discretion.

3 R. S., 442, § 14; 2 R. S. (Edm.), 557, § 26; Code Civ. Proc., §§ 13, 2287, § 143, *ante*.

§ 682. **Rule for punishment of accessory.** — When an act or omission is declared by statute to be a misdemeanor, and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who aids, or abets another in such act or omission is also guilty of a misdemeanor.

New. (See § 81, *ante*.)

§ 683. **Sending letter; when deemed complete.** — In the various cases, in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any post-office or other place, or delivered to any person, with intent that it shall be forwarded. And the party may be indicted and tried in any county wherein such letter is so deposited or delivered, or in which it is received by the person to whom it is addressed.

See 2 R. S. (Edm.) 698, § 58, and §§ 235, 558, 559, *ante*.

§ 684. **Omission to perform duty.** — No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

New. (See §§ 117, 154, *ante*.)

§ 685. **Attempts to commit crimes.** — A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself.

3 R. S., 994, § 47; 2 R. S. (Edm.), 725, § 26; see §§ 84, 85, *ante*.

§ 686. **Attempts to commit crimes.** — A person who unsuccessfully attempts to commit a crime is indictable and punishable, unless otherwise specially prescribed by statute, as follows:

1. If the crime attempted is punishable by the death of the offender, or by imprisonment for life, the person convicted of

the attempt is punishable by imprisonment for not more than ten years ;

2. In any other case he is punishable by imprisonment for not more than half of the longest term, or by a fine not more than one-half of the largest sum, prescribed upon a conviction for the commission of the offense attempted, or by both such fine and imprisonment.

3 R. S., 988, § 8; Laws 1875, ch. 24; 2 R. S. (Edm.), 721, § 8.

§ 687. **Restrictions upon preceding sections.** — The last section does not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

New.

§ 688 **Second offense.** — A person who, after having been convicted within this state of a felony, or an attempt to commit a felony, or of petty larceny, or, under the laws of any other state, government or country, of a crime which, if committed within this state, would be a felony, commits any crime within this state, is punishable, upon conviction of such second offense, as follows :

1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life ;

2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction.

3 R. S., 989, §§ 8, 10; 2 R. S. (Edm.), § 8.

Where the first offense was committed and the conviction had in another state, *held*, not amenable to the penalty as for a second offense here. (*People v Caesar*, 1 Park., 645)

The second offense must be committed after a conviction for the first in order to warrant the enhanced penalty. (*People v Butler*, 3 Cow., 347.)

Requisites of an indictment for second offense. (*Gibson v. People*, 5 Hun, 542; *People v. Youngs*, 1 Cal., 37; *Stevens v. People*, 1 Hill, 261.)

§ 689. **Second offense.** — A person, who, having been convicted within this state of a misdemeanor, afterwards commits

and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony.

3 R. S., 989, § 9.

§ 690. **Habitual criminals.** — Where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state, of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted in this state of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal.

Laws 1873, ch. 357, § 1; Code Crim. Proc., § 510.

§ 691. **Person, etc., of habitual criminal.** — The person of an habitual criminal shall be at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where the criminal may be found, to the same extent that a minor is subject to the control of his parent or guardian.

Id., § 2; Code Crim. Proc., 514.

§ 692. **Effect of pardon.** — The governor may grant a pardon which shall relieve from judgment of habitual criminality as from any other sentence; but upon a subsequent conviction for felony of a person so pardoned, a judgment of habitual criminality may be again pronounced on account of the first conviction, notwithstanding such pardon.

New.

§ 693. **Woman concealing birth of issue.** — A woman, who, having been convicted of endeavoring to conceal the still birth of any issue of her body, which, if born alive, would be a bastard, or the death of any such issue under the age of two years, subsequently to such conviction endeavors to conceal any such birth or death, is punishable by imprisonment in a state prison not exceeding five years, and not less than two years.

3 R. S., 972, §§ 22, 23; Laws 1845, ch. 260, § 4; Laws 1873, ch. 335; see § 296, *ante*.

§ 694. **Imprisonment on two or more convictions.** — Where a person is convicted of two or more offenses, before sen-

tence has been pronounced upon him for either offense, the imprisonment, to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

3 R. S., 990, § 11; 2 R. S. (Edm.), 723, § 11.

§ 695. Imprisonment on two or more convictions.—Where a person, under sentence for a felony, afterward commits any other felony, and is thereof convicted and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of all the terms of imprisonment, to which he is already sentenced.

Id; 2 R. S. (Edm.), 723, § 11.

§ 696. Convict, when sentenced for life.—When a crime is declared by statute to be punishable by imprisonment for not less than a specified number of years, and no limit of the duration of the imprisonment is declared, the court authorized to pronounce judgment upon conviction may, in its discretion, sentence the offender to imprisonment during his natural life, or for any number of years not less than the number prescribed.

2 R. S., 990, § 12; 2 R. S. (Edm.), 723, § 12.

§ 697. Sentences, how limited.—Where a convict is sentenced to be imprisoned in a state prison for a longer period than one year, it is the duty of the court before which the conviction is had to limit the term of the sentence so that it will expire between the month of March and the month of November, unless the exact period of the sentence is fixed by law.

Laws 1836, p. 280, ch. 171, § 6; see *Miller v. Finkle*, 1 Park., 374.

§ 698. Imprisonment of female convict.—A female, convicted of a felony punishable by imprisonment, must be sentenced to imprisonment in a county penitentiary, instead of a state prison. If there is no penitentiary in the county in which she is convicted, she must be sentenced to imprisonment in the nearest penitentiary.

3 R. S., 1093, § 118; 2 R. S. (Edm.), 509, § 85; Laws 1877, ch. 173, § 3.

§ 699. Persons between the age of sixteen and twenty-one years.—Where a person between the ages of sixteen and

twenty-one years is convicted of a felony, or where the term of imprisonment of a male convict for a felony is fixed by the trial court at three years or less, the court may direct the convict to be imprisoned in a county penitentiary, instead of a state prison, if there is a county penitentiary within the judicial district in which the trial is had.

8 R. S., 998, § 36; Laws 1856, ch. 158.

§ 700. Persons between sixteen and thirty years. — A male between the ages of sixteen and thirty, convicted of felony, who has not theretofore been convicted of crime, may, in the discretion of the trial court, be sentenced to imprisonment in the New York State Reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory.

8 R. S., 1114, § 250; Laws 1876, ch. 207, § 4.

§ 701. House of refuge. — Where a person under the age of sixteen years is convicted of crime, the trial court may, instead of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge under the provisions of the statute relating thereto. Where the conviction is had and the sentence is inflicted in the first, second or third judicial district, the place of confinement must be the house of refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the city of New York; where the conviction is had and the sentence inflicted in any other district, the place of confinement must be in the Western House of Refuge for Juvenile Delinquents. But nothing in this section shall affect the provision contained in section seven hundred and thirteen.

8 R. S., 990, § 20; Id., 991, §§ 21, 22; 2 R. S. (Edm.), 724, § 17; Laws 1846, ch. 148.

A prisoner under sixteen years of age, convicted of burglary, is liable to imprisonment in state's prison, but may, after conviction be sentenced to house of refuge. (*Park v. People*, 1 Lans., 263.)

§ 702. Imprisonment in county jail. — Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term less than one year, the imprisonment must be inflicted by confinement in the county jail, or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute.

8 R. S., 990, § 12; 2 R. S. (Edm.), 719, § 40.

§ 703. Imprisonment in county jail or state prison. —

Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison. No person shall be sentenced to imprisonment in a state prison for less than one year.

3 R. S., 990, § 12; Laws 1863, ch. 415.

§ 704. Imprisonment in state prison. —

Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections six hundred and ninety-eight, six hundred and ninety-nine, seven hundred, and seven hundred and one.

3 R. S., 990, § 12.

§ 705. Place to be specified in sentence of removal. —

The place of the imprisonment must be specified in the judgment and sentence of the court. But convicts may be removed from one place of confinement to another, in a case, and by the authority, designated by statute.

3 R. S., 1093, § 120; *Id.*, 1094, § 124.

§ 706. Limit of fine. —

Where, in this Code, or in any other statute making any crime punishable by a fine, the amount of the fine is not specified, a fine of not more than five hundred dollars may be imposed.

2 R. S. (Edm.), 723, § 13; see § 14, *ante*.

§ 707. Forfeiture. —

A sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced.

3 R. S., 994, § 39; 2 R. S. (Edm.), 724, § 19.

When a person is convicted all civil rights are suspended from the time of sentence. (*Miller v. Finkle*, 1 Park., 374.)

When the plaintiff or defendant in a civil suit is sentenced to imprisonment in the state's prison, although only for a term of years, the suit is abated. (*O'Brien v. Hagan*, 1 Duer, 664.)

§ 708. **Consequence of sentence.**—A person sentenced to imprisonment for life is thereafter deemed civilly dead.

8 R. S., 994, § 40; 2 R. S. (Edm.), 724, § 24; 1 R. L., 411, § 17.

(a) **Civilly dead.**—A person attainted under the act is considered "*civiliter mortuus*." (*Jackson v. Callin*, 2 Johns., 248; 8 id., 520.)

Civil death, and its effect in a suit pending. (*Freeman v. Frank*, 10 Abb., 370.)

(b) **Abatement of action.**—As to what imprisonment abates an action. (*Graham v. Adams*, 2 Johns. Cas., 408; *O'Brien v. Hagan*, 1 Duer, 664.)

(c) **Civil rights.**—When a person is convicted all civil rights are suspended from the time of conviction. (*Miller v. Finkle*, 1 Park., 374.)

A person convicted of felony and sentenced to imprisonment for life, is *civiliter mortuus*. (*Troup v. Wood*, 4 Johns. Ch., 228, 246; Coke Litt., 130; 1 Bl. Com., 133.)

Not so, however, if prior to March 29, 1799. (*Platner v. Sherwood*, 5 Johns. Ch., 118.)

(d) **Service of process on convict.**—Service of process upon a convict in a state prison is valid, and gives the court jurisdiction. (*Davis v. Duffie*, 4 Abb. [N. S.], 478.)

The suspension of civil rights, which the statute declares to be the effect of a sentence in a state prison, does not give him any immunity from actions or suspend the rights of others. (*Id.*)

(e) **Effect of a pardon.**—A person who has been sentenced for life and afterwards pardoned, is restored to his duties as a parent, and is entitled to the custody and care of his children who had been placed under the care of a guardian appointed during his civil death. The effect of pardon is to acquit the offender of the penalties annexed to the conviction, and give him new credit and capacity. (*Matter of Deming*, 10 Johns., 232.)

Bail are entitled to an *exoneretur*, where their principal has been convicted of a felony and sentenced to imprisonment in a state prison for a term of years in another state. (*Loftin v. Fowler*, 18 Johns., 385.)

§ 709. **Convict protected by law.**—A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not sentenced or convicted.

8 R. S., 994, § 41; 2 R. S. (Edm.), 724, § 21; see *Davis v. Duffie*, 4 Abb. (N. S.), 478.

§ 710. **Certain forfeiture abolished.**—A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeit-

ures to the people of the state, in the nature of deodands, or in a case of suicide, or where a person flees from justice, are abolished.

3 R. S., 994, § 42; 2 R. S. (Edm.), 724, § 22; 1 R. L., 495, § 3; see § 173, *ante*; Code Crim. Proc., § 819.

§ 711. **Convict voting.** — The prohibition to vote at an election, contained in any statute of the state, shall not apply to a person heretofore or hereafter convicted of any crime, who has been sentenced or committed therefor to one of the houses of refuge or other reformatories organized under the statutes of the state.

3 R. S., 994, § 44; Laws 1847, ch. 240, § 15.

§ 712. **Witness' testimony.** — The sections of this Code which declare that evidence obtained upon the examination of a person as a witness shall not be received against him in a criminal proceeding do not forbid such evidence being proved against such person upon any charge of perjury committed in such examination.

See §§ 79, 142, 241, 342, 469, *ante*.

§ 713. **Sentence of minor.** — When a person under the age of twelve is convicted of a misdemeanor, he may, in the discretion of the court, instead of being sentenced to fine or imprisonment, be placed in charge of any suitable person willing to receive him, and be thereafter, until majority or for a shorter term, subjected to such discipline and control of the person receiving him as a parent or guardian may exercise over a minor.

New.

§ 714. **Convict as witness.** — A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question.

2 R. S. (Edm.), 724, § 23; Laws 1880, ch. 416; Laws 1872, ch. 113; see, also, Code Civil Proc., § 832.

Under the Revised Statutes (2 R. S., 681, § 1), any person convicted of perjury was rendered incompetent; not, however, until sentence had been pronounced. (*Blaufus v. People*, 69 N. Y., 107.)

Conviction of an infamous crime in another state or country does not render him incompetent in this state. (*National Trust Co. v. Roberts*, 10 J. & Sp., 100; *People v. Noyes*, cited 12 Hun, 234; *People v. Frothingham*, 3 Hall L. J., 184.)

§ 715. **Husband and wife as witnesses.** — The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage.

3 R. S., 163, §§ 94, 95, 96; Code Civil Proc., § 831; Laws 1867, ch. 837, §§ 2, 3; 7 R. S. (Edm.), 198.

§ 716. **Creditor of convict** — A person injured by the commission of a felony, for which the offender is sentenced to imprisonment in state prison, is deemed the creditor of the offender, and of his estate after his death, within the provisions of the statutes relating thereto.

3 R. S., 990, §§ 20, 21, 22.

§ 717. **Damages, how ascertained.** — In a case specified in the last section, the damages sustained by the person injured by the felonious act, may be ascertained in an action brought for that purpose by him against the trustees of the estate of the offender, appointed under the provisions of the statutes, or the executor or administrator of the offender's estate.

Id., § 18.

§ 718. (Amended 1882.) **Construction of terms.** — In construing this Code, or an indictment or other pleading in a case provided for by this Code, the following rules must be observed, except when a contrary intent is plainly declared in the provision to be construed, or plainly apparent from the context thereof:

1. Each of the terms, "neglect," "negligence," "negligent" and "negligently," imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

2. Each of the terms "corrupt" and "corruptly" imports a

wrongful desire to acquire or cause some pecuniary or other advantage to or by the person guilty of the act or omission referred to, or to some other person.

3. Each of the terms "malice" and "maliciously" imports an evil intent or wish or design to vex, annoy or injure another person, or to maltreat or injure an animal.

4. The term "knowingly" imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require a knowledge of the unlawfulness of the act or omission.

5. Where an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person.

6. The term "vessel" includes ships, steamers, canal boats and every boat or structure adapted to navigation or movement from place to place by water, either upon the ocean, lakes, rivers or artificial waterways.

7. The term "signature" includes any memorandum, mark or sign written with intent to authenticate any instrument or writing or the subscription of any person thereto.

8. The term "writing" includes both printing and writing.

9. The term "property" includes both real and personal property, things in action, money, bank bills, and all articles of value.

10. The singular number includes the plural and the plural the singular.

11. A word used in the masculine gender comprehends as well the feminine and neuter.

12. A word used in the present tense includes the future.

13. The term "person" includes a corporation or joint association as well as a natural person. When it is used to designate a party whose property may be the subject of any offense, it also includes the state or any other state government or country which may lawfully own property within the state.

14. The term "real" property includes every estate, interest and right in lands, tenements and hereditaments.

15. The term "personal property" includes every description of money, goods, chattels, effects, evidence of rights in action, and all written instruments by which any pecuniary obligation, right or title to property, real or personal, is created, acknowl-

edged, transferred, increased, defeated, discharged or diminished, and every right and interest therein.

New in form. (Various enactments collected and consolidated.)

§ 719. Application of this Code to prior offenses. — Nothing contained in any provision of this Code applies to an offense committed or other act done, at any time before the day when this Code takes effect. Such an offense must be punished according to, and such act must be governed by, the provisions of law existing when it is done or committed, in the same manner as if this Code had not been passed; except that, whenever the punishment or penalty for an offense is mitigated by any provision of this Code, such provision may be applied to any sentence or judgment imposed for the offense after this Code takes effect. An offense specified in this Code, committed after the beginning of the day when this Code takes effect, must be punished according to the provisions of this Code, and not otherwise.

New. (See § 2, *ante*, and authorities there cited.)

§ 720. Application of this Code to prior offenses. — The provisions of this Code are not to be deemed to affect any civil rights or remedies existing at the time when this Code takes effect, by virtue of the common law or of any provision of statute.

New. (See § 2, and cases there cited.)

§ 721. Intent to defraud. — Whenever, by any of the provisions of this Code, an intent to defraud is required, in order to constitute an offense, it is sufficient if an intent appears to defraud any person, association or body politic or corporate, whatever.

8 R. S., 995, § 58.

§ 722. Civil remedies, preserved. — The omission to specify or affirm in this Code any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

New.

§ 723. Proceedings to impeach, etc., preserved. — The omission to specify or affirm in this Code any ground or forfeit-

ure of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension.

New.

§ 724. **Military punishments, etc., preserved.**—This Code does not affect any power conferred by law upon any court-martial or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officers, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this Code.

New.

§ 725. (Amended 1882.) **Certain statutes continuing in force.**—Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by subsequent laws:

1. All acts incorporating municipal corporations, and acts amending acts of incorporation, or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers and duties of such officers.

2. All acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in section six hundred and twenty-six of this Code.

3. All acts for the punishment of intoxication or the suppression of intemperance or regulating the sale or disposition of intoxicating or spirituous liquors.

4. All acts defining and providing for the punishment of offenses and not defined and made punishable by this Code.

New.

§ 726. **General repeal.**—All acts and parts of acts which are inconsistent with the provisions of this act are repealed, so

far as they impose any punishment for crime, except as herein provided.

New.

§ 727. (Amended 1882.) **When act to take effect.**— This act shall take effect on the first day of December eighteen hundred and eighty-two. When construed in connection with other statutes it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

New.

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